

Buffalo Law Review

Volume 66 | Number 1

Article 4

1-1-2018

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Recommended Citation

Nathan Woodard, *The New Wild West: Exploring Western New York's Underground, Fraudulent Debt Collection Industry*, 66 Buff. L. Rev. 239 (2018).

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COMMENT

The New Wild West: Exploring Western New York's Underground, Fraudulent Debt Collection Industry

NATHAN WOODARD[†]

INTRODUCTION

It starts with a phone call. You, or worse yet, a friend, family member, or an ex-spouse, receive a call from an “attorney.” This “attorney” informs you that a creditor retained his firm to settle a debt that you allegedly owe. You are told that a “[two]-part felony complaint” will issue for your arrest; law enforcement will arrive within the hour to pick you up on these charges.¹ This “attorney” then asks you to secure any firearms or dogs—for the officers’ safety—and to arrange for supervision of any minor children.² You request verification of this debt, but you are told that their

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1. See, e.g., Plaintiffs’ Statement of Material Facts as to Which There Is No Genuine Issue to Be Tried at 39, *FTC v. Vantage Point Servs., LLC*, No. 15-CV-6S, 2017 U.S. Dist. LEXIS 111084 (W.D.N.Y. July 18, 2017) [hereinafter *Pls. SoMF*]; Phil Fairbanks, *Abusive Debt Collector Gets 78 Months in Federal Prison*, *BUFF. NEWS* (June 1, 2017), <http://buffalonews.com/2017/05/31/abusive-debt-collector-gets-78-months-prison/>.

2. See, e.g., *Pls. SoMF*, *supra* note 1, at 39.

agency already sent you multiple notices to which you failed to respond, and the “attorney’s” firm cannot stay your arrest any longer. Next, you are told that the only way for you to avoid arrest is to obtain a court release number, which you will receive only upon proof of payment. You panic. You do not have any outstanding debt nor do you recall any prior dealings with the supposed creditor, but this “attorney” knows your address, your relatives, and even your social security number.

You do not have the money but do not want to go to jail, so you scrape together all the money you can and borrow the rest. You call back, say you have the money, and ask how to pay. The “attorney” then informs you that his office only handles the “legal paperwork” and directs you to call the firm’s payment processor at another number. Only then do you learn that, due to your financial history, they will only accept wire-transfers or money orders. You make the payment as directed and call the “attorney” back to obtain your “court release number.” Wishing this nightmare would end, you call the court and give the clerk your release number. The clerk, however, has no idea what you are talking about—your “court release number” is meaningless to them. Only now, once the panic of imminent arrest subsided, do you realize that you have been scammed. There is no “attorney”—the caller was merely a rogue debt collector engaged in an elaborate, fraudulent scheme designed to prey on your fear.³

While American consumers fall victim to these devious debt collection practices every day, debt collection is the

3. *See generally* Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment Against Vantage Point Services, LLC, et al., *FTC v. Vantage Point Servs, LLC*, No. 15-CV-6S, 2017 U.S. Dist. LEXIS 111084 (W.D.N.Y. July 18, 2017) [hereinafter *Pls. MSJ*] (alleging abusive, deceptive, and fraudulent tactics one debt collection operation employed to collect on consumer debt). *See also* *Vantage Point Servs., LLC*, 2017 U.S. Dist. LEXIS 111084, at *2.

largest industry in Western New York (WNY).⁴ Debt collection ranks number one among consumer complaints reported to the Federal Trade Commission (FTC) each year by a wide margin.⁵ In 2016, the FTC received more debt collection complaints than the next two complaint categories—imposter scams and identity theft—combined.⁶ Yet, in WNY, business is booming. Nearly five thousand people are employed in the industry in WNY.⁷ The appeal is obvious: for a minimal capital investment, anyone can open their own collection agency yielding massive returns.⁸ In these small, unregulated collection agencies, unlawful and

4. The Bureau of Labor Statistics map and corresponding table titled “[m]etropolitan areas with the highest concentration of jobs and location quotients in this occupation” shows Buffalo, NY, among metropolitan areas with the highest concentration of debt collections and the most aggregate jobs of all metropolitan areas listed therein. BUREAU OF LAB. STATS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2016: 43-3011 BILL AND ACCOUNT COLLECTORS, (2017), <https://www.bls.gov/oes/current/oes433011.htm>. See also Fred O. Williams, *Buffalo Collection Firms Are Part of an Industry That Too Often Uses Threats and Lies to Collect Millions in Unpaid Bills*, BUFF. NEWS, July 23, 2006, at A1, A8, http://www.kiplingerprogram.org/kiplinger/projects_art/fred%20williams.pdf.

5. FED. TRADE COMM’N, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY–DECEMBER 2016 6, 79 (2017) https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/csn_cy-2016_data_book.pdf [hereinafter FTC SENTINEL DATABASE] (accounting for 28% of all consumer complaints received by the FTC in 2016).

6. *Id.*

7. BUREAU OF LAB. STATS., *supra* note 4; Phil Fairbanks, *Buffalo Becomes ‘Ground Zero’ for Abusive Debt Collectors*, BUFF. NEWS (Aug. 5, 2017), <http://buffalonews.com/2017/08/05/abusive-debt-collectors-find-home-buffalo/>. But see Interview with Karen Davis, Senior Consumer Fraud Representative, New York State Attorney General’s Office: Bureau of Consumer Fraud & Protection, in Buffalo, N.Y. (Feb. 6, 2017) [hereinafter Davis Interview] (alleging that this number could be much higher because debt collectors frequently do not report income or employment; she estimates that the actual number is likely closer to 10,000).

8. Federal prosecutors obtained an audio recording of one collection agency owner stating that it “did 370 grand [in] the month of March. We’re on a \$300,000 a month pace right now.” Rick Pfeiffer, *Feds Take Down Local Debt Collection Operation*, NIAGARA GAZETTE (June 28, 2017), http://www.niagara-gazette.com/news/local_news/feds-take-down-local-debt-collection-operation/article_af640bcc-cc91-51ba-a256-44e8f07ec9d4.html.

devious practices are commonplace.

Part I of this Comment provides a historical background of debtor-creditor relations in the United States and context explaining why society, in general, views debtors unsympathetically. It then explains the debt collection industry's rapid, but isolated, development in WNY. Part II outlines the collection scheme's development, which is designed to avoid detection. In this light, Part III outlines the rampant criminal conduct customary among WNY collectors. Here, the most egregious practices are discussed individually. Part IV begins by discussing how such pervasive illegality grew unfettered in the region before addressing the particular barriers hindering law enforcement from stopping these illegal practices. Part IV also addresses law enforcement's current response to these illegal practices and the need for further remedial measures. This Comment concludes with proposed solutions to reduce the hindrances encumbering law enforcement, and details how they could pave the way towards taming the new "Wild West."

I. HISTORICAL BACKGROUND & CONTEXT

In the United States legal system, creditors have historically enjoyed vastly more favorable treatment than debtors. The development of bankruptcy law and the treatment debtors received throughout American history illustrates creditors' expansive remedies to recover debts, demonstrates residual, popular aversion to indebtedness, and the social rebuke that debtors commonly encounter.⁹ Early American bankruptcy laws virtually copied those

9. Press Release, N.Y. Office of the Attorney General, Attorney General Cuomo Sues to Shut Down Buffalo-based Debt Collection Operation That Illegally Harassed and Threatened Consumers Nationwide (Aug. 18, 2009), <https://ag.ny.gov/press-release/attorney-general-cuomo-sues-shut-down-buffalo-based-debt-collection-operation> [hereinafter Cuomo Press Release] ("Collectors routinely called consumers 'drunks,' 'scumbags,' 'deadbeats,' and, in one instance, 'a low-life piece of trash.'").

conceived in England, which treated debtors quasi-criminally.¹⁰ These laws did not provide protection *for* debtors, but rather protected creditors *from* debtors.¹¹ Common law writs of *fieri facias*, *elegit*, and *levari facias* provided creditors with powerful measures to recover outstanding debts.¹² A writ of *fieri facias* authorized the judicial seizure and sale of a debtor's chattels;¹³ *elegit* forced an appraisal of the debtor's goods and chattels;¹⁴ and *levari facias* authorized judicial seizure and sale of the produce of a debtor's land.¹⁵ Strikingly, in early England, under certain circumstances, the law authorized executing debtors who committed fraudulent acts.¹⁶

While debtors received unsympathetic treatment in early England, they did not fare much better across the pond. In a recent New York collection action, *Southern Chautauqua County Federal Credit Union v. Moore*,¹⁷ Judge Sedita offered a historical overview of imprisonment for nonpayment of private debts in the United States. He stated:

Deprivation of one's liberty for nonpayment of a debt was a normal feature of American commercial life from the colonial era into the beginning of the nineteenth century. Imprisonment for indebtedness was commonplace with at least two signatories of the Declaration of Independence . . . spending time in jail after neglecting loans.¹⁸

10. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6–14 (1995).

11. Pfeiffer, *supra* note 8, at 7.

12. *Id.*

13. *Fieri facias*, BLACK'S LAW DICTIONARY (6th ed. 1990).

14. *Elegit*, BLACK'S LAW DICTIONARY (6th ed. 1990).

15. *Levari facias*, BLACK'S LAW DICTIONARY (6th ed. 1990).

16. Tabb, *supra* note 10, at 11.

17. 39 N.Y.S.3d 360, 361 (Sup. Ct. 2016) (analyzing whether an arrest warrant for contempt should issue for nonpayment of a private debt).

18. *Id.* at 361 (providing a historical analysis of imprisonment arising out of debtor-creditor relations).

Subjected to contemporary analysis, the notion of debtors' prisons contravenes modern senses of equity; yet, at that time, debtors who defaulted received worse treatment than incarcerated criminals.¹⁹ Amazingly, "[d]ebtor size-prisoners were responsible for providing their own food and clothing, which many could not do while non-debtor criminals were fed and clothed by the jail."²⁰

Debtors continued enduring harsh treatment long after the colonies declared independence. Debtors' prisons were not banned under federal law until 1833.²¹ For perspective, in *Moore*, Judge Sedita articulately noted: "Shamefully but tellingly, laws that permitted the deprivation of one's liberty over a private debt were abolished more than three decades before the abolition of slavery."²² Yet, for debtors, outlawing debtors' prisons amounted to a nominal improvement at best.²³

At their inception, primitive bankruptcy laws provided debtors little protection. Congress rarely exercised the powers conferred under the Bankruptcy Clause, which empowered it "[t]o establish . . . uniform Laws on the subject

19. John E. Matejkovic & Keith Rucinski, *Bankruptcy "Reform": The 21st Century's Debtors' Prison*, 12 AM. BANKR. INST. L. REV. 473, 475–76 (2004) (explaining the "deplorable" conditions in debtors' prisons, such as "16 debtors . . . crowded into a 12-foot square room.").

20. *Id.* at 476.

21. *Moore*, 39 N.Y.S.3d at 361. See also 28 U.S.C. § 2007 (2012) (prohibiting "imprisonment for debt"). But see Richard E. James, Note, *Putting Fear Back into the Law and Debtors Back into Prison: Reforming the Debtors' Prison System* 42 WASHBURN L. J. 143, 147–49 (2002) (discussing debtors' prisons' history in the United States and arguing that *de facto* debtors' prisons still exist because creditors attempt to use contempt as a means of imprisoning debtors).

22. *Moore*, 39 N.Y.S.3d at 361.

23. See DAVID M. SCHNEIDER, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1609–1866 148 (1938) (asserting that debtors' imprisonment did not actually cease until 1881 despite New York "abolishing" the practice 50 years earlier in 1831); Creola Johnson, *Creditors' Use of Consumer Debt Criminalization Practices and Their Financial Abuse of Women*, 34 COLUM. J. GENDER & L. 5, 5–6 (2016) ("To many cash-strapped consumers, however, the debtors' prison is alive and well in the twenty-first century.").

of Bankruptcies throughout the United States.”²⁴ Unless Congress utilized this power, states remained free to enact bankruptcy legislation to fill the void.²⁵ Absent congressional exercise of the Bankruptcy Clause, the prohibition of debtors’ prisons did not bind the states, and imprisoning debtors’ remained a common practice throughout the nineteenth century.²⁶ During this period, there was no voluntary bankruptcy, rather, only compulsory filings initiated by creditors were permitted and obtaining a discharge depended entirely upon creditors’ consent.²⁷

Today, nonpayment of a private debt is a civil cause of action.²⁸ As such, debtors are no longer imprisoned simply for defaulting on outstanding debts.²⁹ Debtors today, supposedly, are not subjected to nearly as severe treatment when compared to previous eras.³⁰ On the other hand, as *Moore* illustrates, prohibiting imprisonment for nonpayment gave rise to creditors utilizing contempt motions to imprison debtors to effectuate the same result.³¹

Similarly, the deep-seated notion that defaulting on an obligation represents a quasi-criminal offense has not

24. U.S. CONST. art. I, § 8, cl. 4.

25. Tabb, *supra* note 10, at 13–14 (noting that “states were free to act in bankruptcy matters for all but 16 of the first 109 years after the Constitution was ratified.”).

26. *Id.* at 12–13, 15–16; SCHNEIDER, *supra* note 23, at 148.

27. Compare Tabb, *supra* note 10, at 14–15 with 11 U.S.C. §§ 1126, 1129 (2012) (requiring at least one impaired class of creditors to approve a reorganization plan before the debtor-in-possession can obtain a discharge).

28. *Southern Chautauqua County Federal Credit Union v. Moore*, 39 N.Y.S.3d 360, 362 (Sup. Ct. 2016) (“The penalty imposed for [civil contempt] is designed to compensate or otherwise further the right of the party in whose favor a judicial direction was made.”).

29. Tabb, *supra* note 10, at 16.

30. See *id.*; *Moore*, 39 N.Y.S.3d at 362.

31. *Moore*, 39 N.Y.S.3d at 362; Johnson, *supra* note 23, at 13–25; see James, *supra* note 21, at 149–54 (describing creditors employing civil contempt as a means to imprison debtors).

evaporated in American society.³² This historical condemnation of debtors coupled with creditors' contemporary use of contempt as an alternative means to imprison debtors demonstrates that obvious remnants of early-American debtor-creditor jurisprudence remains today.³³ Thus, such antiquated notions suddenly appear less antiquated than previously assumed.

As debtors gradually started receiving more humane treatment, the average citizen's indebtedness propensity steadily rose. In 2016, in credit card debt alone, the average American owed \$3,600.³⁴ However, this number is skewed because only forty percent of Americans have outstanding credit card debt.³⁵ Therefore, among those who do carry a balance the figure is closer to \$16,048—a ten percent increase since 2013.³⁶ This trend is not a particularly new development, however, over the past century financial institutions' lending propensity skyrocketed.³⁷

For a decade or so leading up to the Great Depression, Americans drastically shifted their opinions regarding credit and borrowing and kick-started the credit-based economy observed today.³⁸ As one economist noted, “societal attitudes toward borrowers changed radically between 1900 and 1920; by the mid-1920s, buying on credit was considered normal, not sinful.”³⁹ As this “buy now, pay later” trend continued,

32. See Cuomo Press Release, *supra* note 9; Tabb, *supra* note 10, at 7.

33. See, e.g., Moore, 39 N.Y.S.3d at 361–62; see generally Tabb, *supra* note 10.

34. Matthew Frankel, *The Average American's Credit Card Debt May Shock You*, USA TODAY (Oct. 12, 2016), <http://www.usatoday.com/story/money/personalfinance/2016/10/12/average-credit-card-debt/91431058/>.

35. See *id.*

36. *Id.*

37. See Beverly M. Burden, *Credit Cards and Home Equity Loans: You Have Been Preapproved . . . Why?*, 6 NORTON BANKR. L. ADVISER 1, 1 (1998).

38. See Atif Mian & Amir Sufi, *Household Debt and the Great Depression*, HOUSE OF DEBT (Mar. 15, 2014), <http://houseofdebt.org/2014/03/15/household-debt-and-the-great-depression.html>.

39. *Id.* (quoting Berkley economics professor Martha Olney).

financers' lending models evolved as well. Diverse new lending models developed rapidly to accommodate the needs of nearly any willing borrower.⁴⁰ One such development particularly relevant to debt collection is the so-called "payday loan."

Payday loans are short-term, high interest loans that are available almost instantaneously.⁴¹ In theory, a payday loan allows a debtor to pay his outstanding liabilities rather than defaulting, and he will repay the loan upon receiving his paycheck.⁴² In reality, the interest rates, sometimes as high as 7300%,⁴³ render these payday loans nearly impossible to pay back. Consumers get caught in a trap because they "frequently do not understand the terms of the loans, and because [payday loans] arguably create a cycle of debt from which many customers cannot escape."⁴⁴ The following example illustrates how consumers get trapped in this downward spiral:

Once one has used a payday loan, for example by borrowing \$400 at \$25 per \$100 in order to pay the rent, the borrower will then owe an extra \$200 every month, unless he or she can get out from under the initial loan by paying it off. That means there is \$200 less

40. See Frankel, *supra* note 34; Burden, *supra* note 37, at 1.

41. Pearl Chin, Note, *Payday Loans: The Case for Federal Legislation*, 2004 U. ILL. L. REV. 723, 724–25 (2004).

42. See *id.* But see CONSUMER FIN. PROT. BUREAU, SUPPLEMENTAL FINDINGS ON PAYDAY, PAYDAY INSTALLMENT, AND VEHICLE TITLE LOANS, AND DEPOSIT ADVANCE PRODUCTS 109–12 (2016), http://files.consumerfinance.gov/f/documents/Supplemental_Report_060116.pdf [hereinafter CFPB Supp.] (reporting that "[o]ver 80% of payday loans are reborrowed within 14 days from the same lender, 85% are reborrowed within 30 days, and 88% are reborrowed within 60 days.").

43. KATHLEEN E. KEEST & ELIZABETH RENUART, THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES 55 (2002); Chin, *supra* note 41, at 724; Al Vaughters, *Outlaw Debt Collectors in WNY Targeted by Authorities*, WIVB NEWS 4 BUFFALO, N.Y. (APR. 24, 2015, 10:58 AM), <http://wivb.com/2015/02/26/outlaw-wny-debt-collectors-targeted-by-ny-ag-and-feds/>. See also N.Y. PENAL LAW § 190.40 (2017) (criminalizing charging interest exceeding 25% "per annum or the equivalent rate for a longer or shorter period" as 2d degree criminal usury, which is a class E felony).

44. Nathalie Martin & Koo Im Tong, *Double Down-and-Out: The Connection Between Payday Loans and Bankruptcy*, 39 SW. L. REV. 785, 786 (2010).

discretionary income available each month for other household items or necessities, which is enough money to be significant in many households, but particularly in households already experiencing cash flow difficulties.⁴⁵

Predictably, for those who succumb to the pressure of taking payday loans, bankruptcy often follows.⁴⁶ If there is not a “casual causation” between bankruptcy filings and payday loans, at the very least, there is a correlation.⁴⁷ One report found that nearly twenty percent of New Mexico debtors who filed bankruptcy under Chapter 7 took out at least one payday loan.⁴⁸ These loans are so notoriously prejudicial to consumers that some scholars argue that the practice implicates the Thirteenth Amendment,⁴⁹ arguing that payday loans have such high, usurious interest rates that they effectually force debtors into indentured servitude.⁵⁰ Consumers who narrowly escape filing bankruptcy, including some who do not, get the equally unpleasant experience of dealing with debt collectors.⁵¹

45. *Id.* at 787.

46. Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?* 1 (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper No. 11-13, 2011) (“For first-time applicants near the 20th percentile of the credit-score distribution who identify the local average treatment effect, access to payday loans causes chapter 13 bankruptcy filings over the next two years to double.”)

47. See Martin & Tong, *supra* note 44.

48. *Id.* at 788.

49. U.S. CONST. amend. XIII, § 1.

50. Zoë Elizabeth Lees, Note, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 SCHOLAR 63, 66 (2012). See also CFPB Supp., *supra* note 42, at 132; Johnson, *supra* note 23, at 29–39 (arguing that women are more susceptible to paying debt collectors when threatened with arrest);

51. See Press Release, U.S. Attorney’s Office W.D.N.Y., Debt Collection Agency Owner Indicted On 41 Charges; Accused of Bilking Thousands of Victims Out of Hundreds of Thousands of Dollars (Mar. 4, 2016), <https://www.justice.gov/usao-wdny/pr/debt-collection-agency-owner-indicted-41-charges-accused-bilking-thousands-victims-out> [hereinafter DOJ Press Release] (discussing Buffalo collectors brazenly violating the automatic stay by misrepresenting themselves as associates of the consumers’ bankruptcy attorney and threatening criminal prosecution if the debtor did not pay).

The Fair Debt Collections Practices Act (FDCPA), defines “debt collector” as “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”⁵² By contrast, “creditor” is defined as any person:

who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.⁵³

It follows that, “[t]he FDCPA distinguishes between debt collectors, who are subject to the statute’s requirements, and creditors, who are not.”⁵⁴ This small distinction between creditors, who actually own the right to repayment, and collectors, complicates an ostensibly straightforward definition, as collectors devise strategies to avoid collection law mandates.⁵⁵

In *Ruth v. Triumph Partnerships*, the corporate defendant (“Triumph”), attempting to avoid liability, asserted that it did not meet the statutory definition of a “debt collector.”⁵⁶ Triumph argued that “it is a creditor and not a debt collector because it purchases delinquent debt thereby becoming one ‘to whom a debt is owed’ under section 1692a(4) [of the FDCPA].”⁵⁷ The court held that “a party that seeks to collect on a debt that was in default when acquired is a debt collector under the FDCPA, ‘even though it owns

52. 15 U.S.C. § 1692a(6) (2012).

53. § 1692a(4).

54. *Ruth v. Triumph P’ships*, 577 F.3d 790, 796 (7th Cir. 2009).

55. See FTC SENTINEL DATABASE, *supra* note 5, at 81 (noting that in 2016, of the 859,090 debt collection complaints the FTC received, only 2,146 (0.025%) were against creditors; the remaining 99.75% were against third party debt collectors).

56. 577 F.3d at 796.

57. *Id.*

the debt and is collecting for itself.”⁵⁸ In the end, the *Ruth* court reversed the district court’s order granting defendant’s motion for summary judgment,⁵⁹ but the standard applied highlights how unique complications can arise from a standard that depends on the debt’s status when acquired rather than the parties’ conduct.⁶⁰

Securitization blurs the ever-finer line between “creditor” and “collector.”⁶¹ Now “paper”—the industry term for debt—is bought, sold, and traded as frequently as securities.⁶² A collector can purchase a portfolio, acquiring all rights to repayment for the debts contained therein, without extending any credit whatsoever.⁶³ From a business prospective, each outstanding debt represents a fraction of the creditor’s accounts receivable.⁶⁴ Accounts receivable are freely transferable assets.⁶⁵ The securitization process involves dividing a business’s accounts receivable, or individual debts, and compiling them into a portfolio.⁶⁶ Thus, the purchaser’s risk is limited to the portfolio’s price, while the original creditor mitigates their potential losses by selling their right to repayment. In this situation, everyone wins, except for debtors.

Consumer debt securitization is an example of one rapidly increasing, deleterious means to advance financiers’

58. *Id.* at 797 (quoting *McKinney v. Cadleway Props., Inc.*, 548 F.3d 496, 501 (7th Cir. 2008)).

59. *Id.* at 806.

60. *See id.*

61. Andreas Jobst, *What Is Securitization?*, FIN. & DEV. 48, 48–49 (Sept. 2008), <https://www.imf.org/external/pubs/ft/fandd/2008/09/pdf/basics.pdf> (providing a basic overview of the securitization process).

62. *See id.*

63. *See Ruth*, 577 F.3d at 796–98; Burden, *supra* note 37.

64. *See, e.g.*, Thomas E. Plank, *Assignment of Accounts Receivables Under Article 9: Structural Incoherence and Wasteful Filing*, 68 OHIO ST. L. J. 231, 233 (2007).

65. *See id.* at 233–34.

66. *See Jobst, supra* note 61, at 48.

goals in a credit-based economy.⁶⁷

The supply of consumer loan products such as credit card and home equity loans has grown because of the profitability of securitizations of consumer debt instruments. Ten years ago securitizations of consumer loans were virtually unheard of. Today, almost half of all outstanding credit card loans, \$180 billion out of \$400 billion outstanding, have been securitized and sold.⁶⁸

This form of securitization is nearly identical to mortgage-backed securitization; it differs only to the extent that consumer debts are almost exclusively unsecured.⁶⁹ This distinction is important. Anyone acquiring a secured property interest can only foreclose or repossess the collateral securing the loan once.⁷⁰ It follows, when secured creditors fail to comply with the Uniform Commercial Code (UCC) or collection laws, their security interest is adversely affected—they potentially forfeit the right to repossess the collateral or, in some cases, incur punitive damages.⁷¹ This is not an issue with unsecured debt because no collateral exists. Therefore, collectors have nothing to lose if they engage in deceptive, fraudulent, or illegal collection tactics. Lacking any self-interest compelling them to comply with collection laws, collectors are virtually unrestrained when developing and utilizing deceptive or fraudulent collection schemes.

Likewise, because the securitization process divorces the original creditor from the underlying obligation, debtors'

67. *See id.* at 48, 49.

68. Burden, *supra* note 37.

69. *See id.* (describing the availability of credit today).

70. *See* Plank, *supra* note 64, at 233–38 (highlighting issues in perfection of security interests in accounts receivable); Davis Interview, *supra* note 7 (describing multiple collection attempts on the same debt).

71. 11 U.S.C. § 362(k) (2012) (outlining remedies available to debtors harmed by creditor(s)' violation of the automatic stay, which expressly provides for punitive damages in "appropriate circumstances."); U.C.C. § 9-625 (AM. LAW INST. & UNIF. LAW COMM'N 2013).

ability to verify debts is substantially impaired.⁷² More often than not, a debt portfolio will change hands many times before any collection attempts are made. For creditors disinterested in collections, selling the obligation completely removes them from the collection process.⁷³ Even if the original creditor predominately places debt with a legally compliant collection agency, that agency often is far removed from the equation by the time the debt lands in WNY.⁷⁴

Legally compliant agencies will “work” a portfolio for as long as it remains profitable, but when the revenue stream starts running dry, there is a strong incentive to sell the remaining, uncollected debts. This process exemplifies the economic law of diminishing marginal returns. After an agency collects a certain percentage of the portfolio, the rate of return will continually decline.⁷⁵ To illustrate, imagine a compliant company successfully collected sixty percent of a portfolio. That agency is better off selling the remaining forty percent to another at a discount rate. Selling the portfolio’s remaining debt allows employees to collect on debt yielding a higher rate of return.⁷⁶

72. See Jobst, *supra* note 61, at 48.

73. See, e.g., Jamie Kocis, *United States: Uncertainty in Securitization of Consumer Debt Continues After Supreme Court Denies Certiorari in Madden v. Midland Funding*, MONDAQ (July 22, 2016), <http://www.mondaq.com/unitedstates/x/512524/securitization+structured+finance/Uncertainty+in+Securitization+of+Consumer+Debt+Continues+After+Supreme+Court+Denies+Certiorari+in+Madden+v+Midland+Funding>.

74. See Jake Halpern, *Will Guys with Guns Replace the Agency Elizabeth Warren Created?*, N.Y. TIMES (Nov. 26, 2016), https://www.nytimes.com/2016/11/26/opinion/sunday/will-guys-with-guns-replace-the-agency-elizabeth-warren-created.html?_r=0.

75. For an overview of the law of diminishing marginal returns, see *Law of Diminishing Marginal Returns*, FARLEX FINANCIAL DICTIONARY (2012), <https://financial-dictionary.thefreedictionary.com/Law+of+diminishing+marginal+returns>.

76. Regardless of whether or not the business is run lawfully, profit maximization is governed by the laws of economics. In the context of collections, this means selling the partially worked paper until it is no longer profitable. See *id.*

As previously noted, payday loans account for a majority of the debt WNY agencies collect, which helped fortify the region as the nation's "debt collection capital."⁷⁷ Notwithstanding the numerous articles documenting the contemporary issues concerning payday loans, these loans only contribute to the rogue-debt-collection industry's rapid expansion in WNY.⁷⁸ The purpose of this Comment is not to minimize payday loan's noxious effects nor detract from other's arguments that consumers require greater protection from and education about pitfalls attending high-interest borrowing.⁷⁹ Rather, the purpose is to shed light on other, often ignored, issues that will not simply evaporate if remedial measures focus merely on the underlying debt and ignore the collection tactics employed.

While deleterious in effect, the general notion behind payday lending is not inherently wrongful.⁸⁰ Payday loans operate according to the same fundamental principles as any other loan: a creditor provides access to capital for a borrower to cover liabilities or make new purchases, which the borrower agrees to pay back, over a fixed-term or on demand, with interest.⁸¹ Payday loans follow this basic scheme, with the caveat that interest is astronomically high and they have incredibly short fixed-terms.⁸² Certainly these unfavorable conditions adversely affect debtors, but, standing alone, they are not inherently harmful. Nor do lenders disguise or misrepresent the consumer's contractual obligations

77. Nick Baumann, *Inside the Bizarre, Unregulated World of Debt Collection*, MOTHER JONES (Oct. 25, 2014), <http://www.motherjones.com/politics/2014/10/interview-bad-paper-jake-halpern-debt-collectors> ("Buffalo, New York—the fading industrial city that, oddly enough, has become America's debt-collection capital.").

78. See, e.g., Chin, *supra* note 41, at 724–26.

79. See, e.g., *id.*

80. See Frankel, *supra* note 34.

81. Chin, *supra* note 41, at 724.

82. *Id.*

pursuant to the loan agreement.⁸³ Instead, payday lenders convince desperate consumers to agree to unconscionable terms.⁸⁴ Frequent payday loan defaults occur because consumers erroneously overestimate their ability to repay the loan, not because they are ignorant as to the contract's terms.⁸⁵ When entering into these agreements they overzealously estimate their future earning potential.

The ideology that freedom to contract is an inalienable, individual right remains well-entrenched in American society. American history reveals that many judges and legal scholars adhered to this ideology since the nation's founding. There is no better example of this than *Lochner v. New York*,⁸⁶ and the so-called *Lochner*-era that followed. In *Lochner*, the Supreme Court struck down a New York law regulating how many hours bakery employees could work.⁸⁷ Writing for the majority, Justice Peckham did not merely state that the freedom to contract conforms with the prevailing notions of jurisprudence, but held that the Constitution guaranteed this freedom under the Fourteenth Amendment.⁸⁸ While *Lochner* is widely regarded as “one of

83. See, e.g., Alpha Omega Consulting Grp., Inc., *Payday Loan Agreement*, <http://www.aocg.com/resources/NM1-CASH%20ADVANCE%20CONTRACT.pdf> (last visited Dec. 16, 2017).

84. Compare *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 459 (D.C. Cir. 1965) (holding “that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.”), with CFPB Supp., *supra* note 42, at 109–137 (demonstrating the unconscionable nature of payday loans).

85. See CFPB Supp., *supra* note 42, at 100–08. But see Scott A. Schaaf, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. BANKING INST. 339, 349 (2001) (outlining payday lenders arguments that “disclosing the APR on payday loans is misleading” and that customers have a “very high degree of satisfaction with the [payday lending] system”).

86. 198 U.S. 45 (1905).

87. *Id.* at 64.

88. *Id.* at 53 (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”).

the most condemned cases in United States history,”⁸⁹ it highlights how deeply-rooted the freedom the contract is in American society.

While the Supreme Court later ostensibly overturned *Lochner*,⁹⁰ the underlying ideology—that freedom to contract is absolute—has survived. This lingering ideology coupled with harsh remedies readily available to creditors in previous eras is largely why collection efforts are not well-monitored and collection laws are unenforced. It is precisely this lack of enforcement and industry oversight that caused Buffalo, New York, to become the new “Wild West,” where anything goes so long as someone pays.

II. THE COLLECTION SCHEME & HOW IT WORKS

Contrary to popular belief, debt collection is a difficult business. Nobody enjoys handing over his hard-earned wages to debt collectors, especially if skeptical of the debt’s validity. Yet, this is precisely what Buffalo collectors convince debtors to do every day. How, then, are so many agencies able to accomplish something that seems counterintuitive? Quite simply, debt collection is only difficult when it is done lawfully.⁹¹

When the debt collection industry exploded in Buffalo, debt collectors realized that they could substantially increase their profit margins by simply ignoring collection laws. Collectors soon realized that such flagrant illegality would only succeed if they could disguise their true identities and trick debtors into believing their legitimacy.⁹² Luckily for

89. BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980).

90. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–93 (1937) (repudiating *Lochner* and effectually overturning the decision).

91. See Davis Interview, *supra* note 7. See generally Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 et seq. (2010).

92. See *F.T.C. v. Vantage Point Servs., LLC*, No. 15-CV-6S, 2017 U.S. Dist. LEXIS 111084, at *3–*4, *7 (W.D.N.Y. July 18, 2017).

these collectors, this is not difficult to accomplish with the rise of modern technology.⁹³ Thus, Buffalo collection agencies devised and implemented a three-stage collection approach specifically designed to confuse debtors and render the collector's representations plausible.⁹⁴

The process begins with a "point caller." Point callers make initial contact with the debtors to verify the debtor's contact information. They tend to have limited debt collection experience and are instructed not to deviate from their "talk-off" scripts.⁹⁵ First, they will call the debtor's last known phone number(s).⁹⁶ These calls are rarely successful because debtors often do not answer or their contact information is outdated.⁹⁷ If able to reach the targeted debtor, the point caller leaves a "shake message."⁹⁸

A shake message typically involves the caller vaguely referencing a debt while threatening some form of legal action to follow if the recipient does not return the call. Some agencies leave horrendous shake messages to scare debtors, while others utilize fairly benign scripts that are just intimidating enough to illicit a response from the debtor.⁹⁹

93. *E.g.*, *The Ultimate Skip Tracking Tool that Delivers Deeper Insights*, TLOXP: COLLECTIONS, <http://www.tlo.com/collections-video> (last visited Nov. 1, 2017).

94. *Vantage Point Servs., LLC*, 2017 U.S. Dist. LEXIS 111084, at *7 (noting that "by separating the debt collection business into (at least) three parts—the owner of the debt, the call initiator, and the payment processor—Defendants hoped to insulate themselves from any wrongdoing on the part of those who contacted consumers."). *See also* Pls. MSJ, *supra* note 3, at 3, ("Defendants' outrageous conduct generated scores of consumer complaints, but they structured the operation to delay or evade liability for their illegal practices.").

95. *See* Pls. SoMF, *supra* note 1, at 34–48 (describing the content of "talk-off" scripts used by WNY debt collectors).

96. *See id.*

97. Many complaints report harassment of the debtor's relatives or friends where the collector does not stop pestering the recipient until they locate the debtor. *See* FTC SENTINEL DATABASE, *supra* note 5.

98. *Id.* at 36–37.

99. *See id.* at 34–48.

Inexperienced collectors pose the risk of mistakenly revealing information that could cause a debtor to question the legitimacy of the company or caller. Therefore, requiring strict adherence to prewritten scripts insulates agencies from early exposure.

If the point callers are unable to reach the debtor directly, they begin calling the debtor's family and friends.¹⁰⁰ They will continue calling until someone who knows the debtor answers.¹⁰¹ Once point callers reach a debtor's friend or family member, they provide a vague but intimidating explanation for the call to compel whomever answers to scare the debtor into returning the call.¹⁰² If one does get a live debtor on the phone, he plays dumb and tells the debtor to call the "[l]egal [f]rim [sic] that hired [him]."¹⁰³ Point callers provide debtors a different number to call someone who will explain the situation, and, if questioned, the point callers state that they are merely a "process server" or something similar.¹⁰⁴ And so begins the second phase.

When debtors call "the firm" handling the case, a "live server" answers—invariably with a misleading or fake company name.¹⁰⁵ Based on the point callers' representations, debtors believe they are speaking with an

100. *See id.* at 57–59.

101. *See id.*

102. *See id.*

103. *See* Declaration of Colin A. Hector in Support of Plaintiffs' Motion for Summary Judgment at Exhibit 158, *FTC. v. Vantage Point Servs., LLC*, No. 15-CV-6S, 2017 U.S. Dist. LEXIS 111084 (W.D.N.Y. July 18, 2017).

104. Declaration of Heath Earls Pursuant to 28 U.S.C. § 1746 at 2, *FTC v. Vantage Point Servs., LLC*, No. 15-CV-6S, 2017 U.S. Dist. LEXIS 111084 (W.D.N.Y. July 18, 2017) [hereinafter Earls Decl.]; Pls. SoMF, *supra* note 1, at 32–33, 83.

105. Declaration of Karen Davis Pursuant to 28 U.S.C. § 1746 at 22–23, *FTC v. Vantage Point Servs., LLC*, No. 15-CV-6S, 2017 U.S. Dist. LEXIS 111084 (W.D.N.Y. July 18, 2017) [hereinafter Davis Decl.]; Pls. SoMF, *supra* note 1, at 29. *Cf.* Pfeiffer, *supra* note 8 ("Collana was an associate of Ciffa's who established shell companies, payment processing accounts, and bank accounts to facilitate taking payments from individuals.").

attorney or law enforcement official.¹⁰⁶ Alternatively, once point callers confirm debtors' contact information, live servers start calling debtors from a spoofed phone number.¹⁰⁷ This is where the real intimidation starts. Messages are easily saved, but scared debtors very rarely record live calls, allowing live servers to threaten debtors with anything from excessive fines to substantial prison time.¹⁰⁸ These threats may cause even suspicious debtors to question whether or not they should simply pay in case the threats are true.¹⁰⁹

Live servers are experienced collectors who know what to say and how to say it to intimidate debtors.¹¹⁰ They are able to cleverly evade questions directed at the company's legitimacy or physical location.¹¹¹ Live servers are rude, demanding, and argumentative, which allows them to dominate the conversation.¹¹² Similarly, they possess a shocking dearth of empathy.¹¹³ They maintain a threatening and cold attitude throughout the conversation regardless of the hardships they knowingly force debtors to endure.¹¹⁴ After speaking with live servers, many debtors are terrified and ultimately agree to do whatever it takes to come up with the money demanded.¹¹⁵

If the debtors agree to pay, the live servers provide

106. See, e.g., Earls Decl., *supra* note 104, at 1; Fairbanks, *supra* note 1.

107. See Pls. SoMF, *supra* note 1, at 28, 30.

108. See *id.* at 35–48.

109. See Earls Decl., *supra* note 104, at 1; Pls. SoMF, *supra* note 1, at 35–48.

110. See, e.g., Earls Decl., *supra* note 104, at 1, 2–3.

111. See Pls. SoMF, *supra* note 1, at 33–34.

112. See, e.g., Earls Decl., *supra* note 104, at 2.

113. See, e.g., Zeke Faux, *Millions Are Hounded for Debt They Don't Owe. One Victim Fought Back, With a Vengeance*, BLOOMBERG BUSINESSWEEK, (Dec. 6, 2017) <https://www.bloomberg.com/news/features/2017-12-06/millions-are-hounded-for-debt-they-don-t-owe-one-victim-fought-back-with-a-vengeance>.

114. See generally Earls Decl., *supra* note 104 (discussing how a debt collector was capable of forcing the individual to provide a payment despite his struggle to find the money).

115. E.g., *id.* at 1–2.

another number for the debtors to call when they have the funds to make a payment, which they often need to borrow from friends or family.¹¹⁶ This is the third phase of the scheme. If the debtors inquire why they need to call another number to make a payment, live servers have seemingly plausible answers—e.g., they only handle the legal issues—the other number is for the payment processor.¹¹⁷ Many debtors do not think twice about this explanation because they believe separate payment processing is commonplace and fear what consequences might follow.

Portfolio owners need not sell the portfolio to have another agency “work” it, they may also “place” it.¹¹⁸ Placing a portfolio is analogous to renting the rights to collect to another company, who remits collection commissions back to the owner—it’s like a reverse consignment.¹¹⁹ As detailed below, this causes conflict when collectors illegitimately continue working debt portfolios after they are subsequently placed with another agency.¹²⁰

Many people assume that there is official documentation for these portfolios. They are misinformed. Debt portfolios are nothing more than spreadsheets with the original lender’s name, the principle amount of the debt, and the debtor’s information—which is frequently outdated.¹²¹ Collectors can easily download, save, and share these portfolios even when they are no longer legitimately working

116. *See id.* at 1–2; Pls. MSJ, *supra* note 3, at 3–4; Pls. SoMF, *supra* note 1, at 20–22.

117. *See* Earls Decl., *supra* note 104, at 2–4; Pls. MSJ, *supra* note 3, at 3–5, 9–16; Pls. SoMF, *supra* note 1, at 68–77.

118. *See* *Ruth v. Triumph P’ships*, 577 F.3d 790, 796 (7th Cir. 2009) (describing debt brokers buying and selling debt, but distinguishing themselves from collectors); Davis Interview, *supra* note 7.

119. *See* U.C.C. § 9-102(20) (AM. LAW INST. & UNIF. LAW COMM’N 2013) (defining “consignment” under the U.C.C.).

120. Interview with Anonymous Informant, former Vantage Point Services Debt Collector, in Buffalo, N.Y. (Oct. 14, 2016) [hereinafter Informant Interview].

121. Johnson, *supra* note 23, at 25–27.

it.¹²² It is a common practice among many rogue collection shops to keep these portfolios after working them.¹²³ This practice results in portfolios containing illegitimate debts.¹²⁴ Because debts are bought, placed, and traded so often, creditors, collectors, and debtors have a hard time maintaining accurate information.¹²⁵ Therefore, when portfolio owners subsequently place a portfolio with another collection agency, concurrent attempts to collect the same debt can occur, rendering verification impossible for the debtor.¹²⁶

Sometimes these illegitimate collection attempts are merely negligent and involve no intentional malfeasance. Unfortunately, however, negligent mistakes are the exception. A majority of illegitimate collection attempts result from collectors' conscious and voluntary acts designed to deceive and exploit debtors.¹²⁷ Collection agencies will frequently work a portfolio then, in turn, sell it, including debts they've already collected, to another agency as a purportedly valid debt portfolio.¹²⁸ Rogue collection agencies have no qualms about collecting a debt before reselling it,¹²⁹

122. *See id.*; Davis Interview, *supra* note 7.

123. Informant Interview, *supra* note 120.

124. Johnson, *supra* note 23, at 25–27.

125. Informant Interview, *supra* note 120.

126. *See generally* CONSUMER FIN. PROT. BUREAU, CONSUMER COMPLAINTS (2017), <https://data.consumerfinance.gov/dataset/Consumer-Complaints/s6ew-h6mp> [hereinafter CFPB Database] (compiling debt collection complaints received by the CFPB, many of which state that the collection agency could not verify the debt or provided insufficient verification).

127. *See* Interview with Kevin Sibley, Asst. Special Agent in Charge, U.S. Dep't of Homeland Security, in Buffalo, N.Y. (Mar. 21, 2017) [hereinafter ASAC Sibley Interview].

128. *E.g.*, Phil Fairbanks, *Debt Collector Accused of 'Re-Dos' to Collect Multiple Times*, BUFF. NEWS (June 27, 2017), http://buffalonews.com/2017/06/26/feds-charge-local-debt-collector-fraud/?utm_campaign=puma&utm_medium=social&utm_source=Twitter (addressing how WNY agencies are engaging in “re-do’s,”—or double collections; naturally, if collectors will re-collect debts they will clearly resell them as well).

129. Informant Interview, *supra* note 120.

as doing so yields greater profits.

Greater profits sufficiently incentivize collectors to forego their obligation of good-faith and fair-dealing, or even common decency.¹³⁰ This is especially true when a portfolio does not “hit”—meaning debtors are not paying—because acting within the socially defined moral boundaries does not generate revenue.¹³¹ Therefore, collectors will leave the collected debts in a portfolio, but they resell or place the debt, causing another agency to inadvertently rework it.¹³² This maximizes recovery for sunk costs expended if they acquire an otherwise unprofitable portfolio.

Aggregately, these practices amount to a problem necessitating a solution beyond merely regulating payday loans.¹³³ Payday loans are not the only type of debt being collected.¹³⁴ Rogue collectors will work any type of consumer debt, including credit card debt,¹³⁵ outstanding medical bills, and even student loans. Furthermore, some valid payday loans made over a decade ago remain. Collectors do not want to write-off these debts simply because the statute of limitations has run. This is why solely regulating payday lending will not solve the problem because such regulation does not address the harassing and illegal tactics currently employed in WNY collection agencies.¹³⁶

130. *See id.* (admitting that the collector-informant “knew it was wrong, but it was all about the money”).

131. *See* Cuomo Press Release, *supra* note 9.

132. *See* FTC. v. Vantage Point Servs., LLC, No. 15-CV-6S, 2017 U.S. Dist. LEXIS 111084, at *3 (W.D.N.Y. July 18, 2017); Pfeiffer, *supra* note 8.

133. *See generally* Creola Johnson, Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?, 69 Wash & Lee L. Rev. 649 (2012); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1 (2002).

134. *See* Burden, *supra* note 37 (indicating that modern credit availability will subject new debts and types of debtors to collections).

135. *See id.*; Kocis, *supra* note 73.

136. CFPB Supp., *supra* note 42, at 79–99 (finding that certain states’ efforts to reduce consumer access to payday loans were unsuccessful and, ultimately, did not affect stores’ revenue).

III. ISSUES & ILLEGAL PRACTICES

While the collection crisis in WNY affects various forms of consumer debt, the majority consists of credit card and payday loan debt.¹³⁷ Payday loans are most appealing to members of society with the fewest resources.¹³⁸ Without sufficient due diligence as to a consumers' credit-worthiness, payday lenders dangle a carrot of liquid capital just large enough to lure helpless, desperate, and often uninformed consumers into chasing a short-term sense of financial stability.¹³⁹ That feeling erodes quickly once the loan's short fixed-term is up,¹⁴⁰ and the creditor demands repayment at an incredibly high interest rate.¹⁴¹

Sadly, these schemes target financially distressed consumers.¹⁴² Lenders take advantage of those in the lowest socioeconomic class, who correspondingly are the least educated.¹⁴³ One report noted that Americans with the lowest net worth have the highest amount of outstanding credit card debt.¹⁴⁴ While these lending practices are morally disgraceful, the reprehensible and predatory strategies collection agencies' employ are arguably worse because they are designed to prey on the debtors' assumed ignorance of the

137. See *Plummer v. Atl. Credit & Fin., Inc.*, 66 F. Supp. 3d 484, 484–88 (S.D.N.Y. 2014). See generally CFPB Database, *supra* note 126.

138. CFPB Supp., *supra* note 42, at 74–76. See *Gold v. Midland Credit Mgmt., Inc.*, 82 F. Supp. 3d 1064, 1075–76 (N. D. Cal 2015) (defining the “least sophisticated” consumer that the FDCPA seeks to protect).

139. Chin, *supra* note 41, at 723–25. See also ASAC Sibley Interview, *supra* note 127.

140. See *Johnson*, *supra* note 21, at 13–14.

141. Chin, *supra* note 41, at 724. See also *Keest & Renuart*, *supra* note 43, at 55.

142. Chin, *supra* note 41, at 727–28.

143. See *id.* at 728.

144. Frankel, *supra* note 34 (finding the average credit card debt among those with a negative or zero-net-worth is \$10,307, which is 27% higher than the group with the next highest average).

law and fear of arrest or civil liability.¹⁴⁵

Collectors also appear to lack any moral compass as evidenced by their wrongful collection attempts. They siphon every possible cent out of debtors without regard to other necessities.¹⁴⁶ Many complaints documented by the FTC's and Consumer Finance Protection Bureau's (CFPB) complaint databases tell heart-wrenching stories. For example, elderly consumers complain of having to choose between purchasing their prescription medications or paying the collectors.¹⁴⁷ Examples like this are common but appear with the highest concentration in WNY.¹⁴⁸

Exacerbating these predatory tactics, once a debtor pays, collectors target them because they know "that debtor will continue paying." What follows is a cyclical pattern where debtors forego critical necessities, electing to pay collectors instead, just to stop the harassment. In return, collectors give debtors a brief reprieve before collections begin anew, and the process repeats itself.¹⁴⁹

Collectors do everything in their power to foster a sense of panic and urgency in debtors.¹⁵⁰ This inevitably clouds the

145. Johnson, *supra* note 21, at 13–28 (discussing predatory tactics employed when collecting from economically distressed individuals). *See also* Chin, *supra* note 41, at 727–28.

146. Johnson, *supra* note 21, at 31–35.

147. Johnson, *supra* note 21, at 35–36; Davis Interview, *supra* note 7.

148. *See* Fairbanks, *supra* note 1 ("Buffalo is ground zero for debt collection companies that routinely violate state and federal debt collection laws,' . . . [t]he debt collection industry has a long history here and Morrissey suspects the bad eggs learned the trade from legitimate collectors before going out on their own," (quoting Assistant Attorney General James M. Morrissey)).

149. *See* CFPB Supp., *supra* note 42, at 100–05; Press Release, Consumer Fin. Prot. Bureau, (July 10, 2014), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-ace-cash-express-for-pushing-payday-borrowers-into-cycle-of-debt/> [hereinafter CFPB Press Release] (attaching "[t]he ACE cycle-of-debt training manual graphic," which shows how ACE designed their business model to trap consumers in a "cycle-of-debt"); Fairbanks, *supra* note 128; Davis Interview, *supra* note 7.

150. CFPB Press Release, *supra* note 149.

debtors' judgment, which is precisely the collectors' intent. Unable to think rationally, tunnel vision precludes debtors from noticing any otherwise obvious "red flags."¹⁵¹ Any reluctance is met with offensive, aggressive, and accusatory responses from the collector.¹⁵² Aggressive tactics and insults directed at the debtor are designed to confuse them into believing the collector's legitimacy; to most, the contradictory nature of this approach is only obvious retrospectively.¹⁵³

As previously discussed, collectors specifically target society's lower socioeconomic classes because they are typically the least educated.¹⁵⁴ Preying on less educated or elderly individuals allows collectors to employ flagrantly illegal tactics because these individuals are least likely to know collection laws or how the legal system functions.¹⁵⁵ Most importantly, these debtors do not realize the distinction between civil and criminal actions;¹⁵⁶ they do not know that non-payment of debts is not a criminal offense.¹⁵⁷

Fearing criminal prosecution, debtors will do anything and everything they can to locate funds.¹⁵⁸ Many have families to support, and they fear that their children will be taken away if they are convicted of a criminal offense.¹⁵⁹ This

151. See Earls Decl., *supra* note 104, at 3.

152. See, e.g., *id.* at 2.

153. Cf. *id.* (highlighting the consumer's confusion and initial reaction to the collector, which was not to question the debt but instead try to avoid going to prison).

154. Chin, *supra* note 41, at 727–28.

155. See *id.*; Burden, *supra* note 37. See generally Johnson, *supra* note 23 (describing how collectors tailor their schemes to prey on the most vulnerable consumers).

156. See Informant Interview, *supra* note 120; Johnson, *supra* note 23, at 5–6.

157. Johnson, *supra* note 23, at 5–6.

158. See, e.g., Earls Decl., *supra* note 104, at 1–3; Johnson, *supra* note 23, at 29–40.

159. See Johnson, *supra* note 23, at 29–40 (arguing that women are disproportionately affected when subjected to predatory collection tactics).

belief directly results from the collector's statements.¹⁶⁰ Of course, none of these statements are true, and they all violate the FDCPA.¹⁶¹ Even if they don't whole-heartedly believe the threats, uneducated and unsuspecting debtors might conclude that they should pay anyway to ease their fears.¹⁶² The following two egregious examples illustrate the extent to which collectors engage in repulsive conduct.

The first example demonstrates the despicable manner in which collectors talk to debtors. In this case, a debtor recorded a collector threatening to rape her minor daughter if she did not pay the alleged balance—despite the debtor's insistence that she had no outstanding debt.¹⁶³ This threat is more than just reprehensible—it is a felony offense in New York State.¹⁶⁴ Collectors have demonstrated equal cruelty in their harassing tactics.

A second heart-wrenching example involves a collector who continually harassed an elderly gentleman immediately after the death of his wife.¹⁶⁵ Tragically, this poor man woke up to find his wife had passed away during the night.¹⁶⁶ In the midst of arranging for the coroner to remove his wife's body, and while awaiting a return call from the coroner, a

160. See, e.g., Pls. SoMF, *supra* note 1, at 35–48; Earls Decl., *supra* note 104, at 1.

161. See 15 U.S.C. § 1692 (2010); Pls. SoMF, *supra* note 1, at 47.

162. See Earls Decl., *supra* note 104, at 1–3.

163. Alex Henderson, 'Am I Going to Have to Kill You?' ALTERNET (April 17, 2011), [https://www.alternet.org/story/150638/%27am_i_going_to_have_to_kill_you%27%3A_the_horrific_ways_abusive_debt_collectors_threaten_and_harass_t](https://www.alternet.org/story/150638/%27am_i_going_to_have_to_kill_you%27%3A_the_horrific_ways_abusive_debt_collectors_threaten_and_harass_their_victims) heir_victims.

164. A person is guilty of First Degree Coercion under New York law if they compel or induce another to engage in conduct that they have a right to abstain from “by instilling in the victim a fear that he or she will cause physical injury to a person.” N.Y. PENAL LAW § 135.65.

165. Pls. Complaint and attached audio recordings (on file with author), FTC v. 4 Star Resolution, LLC, No. 15-CV-112S, 2015 U.S. Dist. LEXIS 40597 (W.D.N.Y. Mar. 30, 2015).

166. *Id.*

collector called demanding payment.¹⁶⁷ To no avail, this grief stricken man pleaded with the collector to allow him a few hours to deal with the situation.¹⁶⁸ The collector steadfastly refused to postpone his collection attempt. Instead, despite the man's sobs and pleas, this collector continuously kept soliciting payment.¹⁶⁹

Attempting to capitalize on the debtor's grief this collector taunted the man saying things such as: "your wife would've wanted you to take care of this—it's the right thing to do," and "I don't want to have to call you again."¹⁷⁰ The collector's continuous calls did not cease until the man's probation officer validated his claims.¹⁷¹ While this demonstrates an unfathomable dearth of compassion and morality, these examples don't reveal the fraudulent conspiracy underlying this scheme.

A. "Double Banging"

"Predatory," "threatening," and "harassing" are terms that barely scratch the surface of illegal conduct in which WNY collectors engage. Arguably the most shocking practice is collecting on "re-dos"—also known as "double banging"—which means that the same agency collects on a single debt multiple times.¹⁷² In the most heinous examples, double collection attempts occur while the debtor is still making installment payments on the first attempt.¹⁷³ While regular monitoring of credit reports would likely inform consumers whether collectors' demands are valid, unsophisticated

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. See CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: CFPB ANNUAL REPORT 2016 16–20, 28–29 (2016); Fairbanks, *supra* note 128.

173. See, e.g., Earls Decl., *supra* note 104, at 3–4 (describing a collector's repeated calls in attempt to solicit additional money from a consumer).

consumers are unlikely to do so. Instead, when threatened, often these debtors simply pay.¹⁷⁴

Unfortunately for those who presumably believe that paying will stop the agency's collection efforts, they've just made themselves targets.¹⁷⁵ Counterintuitively for an honest, well-intentioned debtor, making payments actually places a sign on his back that says: "I'm easily intimidated, and will pay." These are precisely the people collectors want to identify.¹⁷⁶ Once identified, collectors will "double bang" consumers who pay by engaging in the same tactics that they did the first time.¹⁷⁷

To do so, on subsequent collection attempts, collectors merely represent themselves as a different agency.¹⁷⁸ In fact, the same techniques that agencies employ to mask their illegal conduct from law enforcement also enables collectors to "double bang" debtors.¹⁷⁹

Collectors frequently misrepresent themselves and their agency's real name over the phone. They do this primarily because it further insulates them from their illegal collection tactics. But a secondary benefit is that varying their agency's name facilitates double-banging. Collectors must use a different agency name when re-collecting a debt, but agency names are easily fabricated over the phone. Moreover, agency owners and managers frequently "stash" registered LLCs and d/b/a names so that the agency name reported to the Better Business Bureau (BBB), FTC, or New York Attorney General (NYAG) does not match the name given to debtors.¹⁸⁰

174. *E.g., id.* at 1–3.

175. *See, e.g.,* Informant Interview, *supra* note 120.

176. *See id.*

177. *Id.*

178. *See* DOJ Press Release, *supra* note 51 (listing eight different company names that a single agency used when contacting consumers).

179. *See id.*; Informant Interview, *supra* note 120.

180. *See* Pls. MSJ, *supra* note 3, at 13–16. *See also, e.g.,* Pls. SoMF, *supra* note

They do this to prepare for the point at which the name they are using generates a substantial number of complaints; they then inevitably switch to a clean name.¹⁸¹ Having these alternative agency names at their disposal is what allows collectors to collect from the same debtor multiple times.¹⁸²

Similarly, collectors often change their phone numbers for largely the same reasons that they change the company name.¹⁸³ Thus, anytime they change their name and phone number it is as if they have just acquired a new portfolio to work, except that this portfolio exclusively consists of “debtors” whom they know are susceptible to their predatory tactics. In this scenario, slightly tweaking their talk-off script, method of payment demanded, or varying their payment accounts sufficiently blinds debtors to the fraud perpetrated against them.¹⁸⁴

To clarify, not every agency engages in double banging, but the practice is by no means rare.¹⁸⁵ Moreover, because paper is placed, traded, bought, and sold so frequently, even agencies attempting to follow the laws may inadvertently engage in double banging.¹⁸⁶ As previously noted, many shops will sell “bad paper”—meaning portfolios that they have already worked—thus rendering validation impossible and double collection attempts inevitable.¹⁸⁷

1, at 29–39.

181. Pls. MSJ, *supra* note 3, at 13–16. *See also*, *supra* note 105 and accompanying text; Informant Interview, *supra* note 120.

182. *See* Davis Decl., *supra* note 105, at 23 tbl.10.

183. *See* Pls. SoMF, *supra* note 1, at 22–29.

184. Informant Interview, *supra* note 120.

185. *Cf.* Fairbanks, *supra* note 128.

186. Informant Interview, *supra* note 120.

187. Baumann, *supra* note 77 (“One other huge problem is there’s no system in place for tracking who owns these debts. Imagine a system where there’s no chain of titles for cars, no VIN numbers, and no DMV. There’d be total chaos!”); Faux, *supra* note 113 (“Therrien had been caught up in a fraud known as phantom debt, where millions of Americans are hassled to pay back money they don’t owe . . . It begins when someone scoops up troves of personal information that are available cheaply online—old loan applications, long-expired obligations, data from hacked

Notably, not all collectors who engage in this practice are culpable. Collection agency managers can “scrub” the portfolio—essentially clear all previously entered collector notes—and then assign it to a collector who unknowingly double bangs the debtor.¹⁸⁸ Similarly, rather than scrubbing paper, they can also “scramble” the portfolio.¹⁸⁹ Functionally, scrambling is no different than scrubbing; it differs to the extent that scrubbing involves reassigning each debt to a different debtor as opposed clearing any information regarding collections.¹⁹⁰

Collectors are effective at “talking-off” debtors’ concerns.¹⁹¹ They convincingly insist that they know nothing about any prior collection attempts and fervently reiterate that the only way they can “help” is to stop the pending legal action—which they can only do after the “debtor” pays.¹⁹²

At their inception, many of these methods began out of necessity rather than willful attempts to defraud debtors. As collection agencies began to amass mountains of complaints against them, apprehensive creditors started refusing to place or sell paper in WNY. This, in and of itself, should demonstrate how pervasive unlawful collection tactics are in the region.¹⁹³ Unable to find paper for their collectors to work, owners sought new ways to continue collecting; thus, they devised the double bang.¹⁹⁴ While borne out of necessity, owners struck gold in devising the notion of double banging debtors as opposed to seeking out and purchasing new

accounts—and reformats it to look like a list of debts. Then they make deals with unscrupulous collectors who will demand repayment of the fictitious bills”).

188. *Id.*; Davis Interview, *supra* note 7.

189. Informant Interview, *supra* note 120.

190. *See id.*

191. *See* JAKE HALPERN, BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD 15 (2014).

192. *See e.g.*, Pls. SoMF, *supra* note 1, at 36–60.

193. ASAC Sibley Interview, *supra* note 127; Davis Interview, *supra* note 7.

194. *See, e.g.*, Pfeiffer, *supra* note 8.

debt.¹⁹⁵

The scheme is the gift that keeps on giving; collectors can recover far more than a debt's face value while eliminating the debt scarcity problem. Not only does this approach yield greater gross income—it costs nothing. Double banging creates a seemingly untamable beast that employees must continually feed to get paid.¹⁹⁶ In this way, collectors become slaves to the beast. They cannot stop collecting because they depend on their paychecks; therefore, when paper is scarce, the only option for collectors is to “double bang.”¹⁹⁷

In the worst collection agencies, informants revealed that, not only is this practice commonplace, but it's repeated as often as possible. Collectors are known to double bang debtors currently making installment payments on their own previous collection attempt.¹⁹⁸ Sadly, because of tactics like this, there are victims to this fraudulent scheme who pay collectors more than ten times the principal amount actually “owed.”¹⁹⁹

Rarely does a debtor's principal balance exceed a few hundred dollars.²⁰⁰ Yet, in the worst cases, victims paid over \$10,000 to satisfy a single debt amounting to a mere fraction of that.²⁰¹ Instead of feeling guilt or empathy, however, collectors mock these victims. Evidence uncovered in some of these agencies includes collectors' notes showing blatant

195. See, e.g., Davis Decl., *supra* note 105, at 2–19 tbl.1–7.

196. Informant Interview, *supra* note 120.

197. See *id.*; HALPERN, *supra* note 191, at 57–58; Davis Interview, *supra* note 7; Fairbanks, *supra* note 1; *infra* text accompanying note 268.

198. ASAC Sibley Interview, *supra* note 127; Davis Interview, *supra* note 7.

199. See Davis Interview, *supra* note 7 (noting, once again, that many debts collected are illegal to collect on in the first place).

200. Payday loan debts typically range from \$100–\$800; however, debtors sometimes pay thousands of dollars to “satisfy” the same debt multiple times. See Informant Interview, *supra* note 120.

201. Davis Interview, *supra* note 7. Cf. *supra* notes 41–51 and accompanying text (referencing the pitfalls attending high-interest lending models).

amusement that they got prior victims to re-pay.²⁰² Appallingly, many of these collectors seem to actually take pride in their ability to continuously elicit payments from victims.²⁰³

B. *Dealing “PiFs” & Lead Sheets*

For WNY collection agencies, attempts to collect on illegitimate debts do not stop at double banging. Many collectors will continue to work recalled paper, or alternatively, intentionally sell bad paper, and this practice is rapidly increasing.²⁰⁴ There are agencies now that deal exclusively in accounts already “paid in full” (PiFs).²⁰⁵ They trade PiFs like kids trade baseball cards.²⁰⁶ Instead of purchasing new debt or paying a commission for collections, they simply swap PiF accounts with other agencies. This practice is as deplorable as it is fraudulent. Agencies exclusively collecting on PiF paper inherently make zero valid collection attempts because there are no valid debts to collect—like re-do’s, they have already been collected.

At these type of agencies, collectors’ claims to consumers are patently false. A collector “unaware” of prior payments or collection attempts for the debt they are currently attempting to collect may very well be the same debt the debtor already paid.²⁰⁷ It is true that sometimes collectors do

202. Davis Interview, *supra* note 7. Cf. Davis Decl., *supra* note 105, at 29–36 (describing documents uncovered pursuant to an immediate access search of a collection agency office space where law enforcement officials found these notes on collectors’ desks).

203. The “pride” many collectors feel does not necessarily stem from causing debtors to panic, but rather from the collectors’ ability to receive a paycheck for effective double banging, *See* Informant Interview, *supra* note 120.

204. *See, e.g.*, HALPERN, *supra* note 191, at 3–7.

205. *See, e.g.*, Informant Interview, *supra* note 120.

206. *Id.* *See also supra* notes 61–76 and accompanying text (describing the complications that arise with securitization and commercial resale of accounts receivable).

207. *See* Informant Interview, *supra* note 120.

not “know” any details regarding prior payments or collections, but because the details are documented on the collection software (unless someone scrubbed the paper), surely they realize that the current attempt is illegitimate.²⁰⁸ Collectors get equal commission bonuses for legitimate and illegitimate collections which incentivizes fervent collection attempts without regard to the debt’s legitimacy.²⁰⁹

Recently, multiple agencies began generating complaints concerning payday loan collection attempts against “debtors” who never applied for—much less took out—a payday loan.²¹⁰ This phenomenon results from the dealing of so called “lead sheets.”²¹¹ Anyone researching payday loans is first prompted to enter their personal information before accessing any information.²¹² Even if that individual elects not to take a loan, which often happens due to the usurious terms, the information that the prospective debtor provided is recorded.²¹³ It is precisely this information that is compiled into lead sheets.

Collectors soon realized that these lead sheets are as good, if not better, than actual paper. Working lead sheets allows collectors to maintain the sense of urgency they create simply by insisting that the consumer can plead his case to a

208. *Id.*

209. *See id.* Cf. HALPERN, *supra* note 191, at 14.

210. *See, e.g.,* Pls. SoMF, *supra* note 1, at 27–60. *See also* Davis Interview, *supra* note 7.

211. ASAC Sibley Interview, *supra* note 127.

212. Cf. CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU TO OVERSEE DEBT COLLECTION MARKET 1, https://files.consumerfinance.gov/f/201210_cfpb_debt-collection-factsheet.pdf (last visited Oct. 2012) [hereinafter Debt Collections Fact Sheet] (“Examiners will assess whether debt collectors are using accurate data in their pursuit of debt. Inaccurate information can lead to collectors attempting to collect debt that consumers do not owe or have already paid.”).

213. *See e.g.,* Johnson, *supra* note 23, at 25–28; Press Release, N.Y. State Dep’t. of Fin. Servs., DFS Announces Settlement with Two Debt Buyers Resulting in \$3 Million of Restitution to Thousands of New York Consumers (May 18, 2016), <http://www.dfs.ny.gov/about/press/prl605181.html>.

judge during ensuing legal proceedings, which they insist are inevitable if the debtor does not pay.²¹⁴

Armed with premeditated, somewhat rational, talking points, collectors can generate nearly equivalent revenue collecting off lead-sheets as they could working legitimate debt.²¹⁵ Once again, they rely heavily on debtors' assumed ignorance, thus rendering this practice not only possible, but profitable.²¹⁶ What is more, lead-sheets are commonly bought and sold just like debt portfolios in WNY,²¹⁷ once again, demonstrating collectors' immunity to debt scarcity—who needs to buy legitimate debt when it can be conjured out of thin air?

The scariest aspect of this development, at least for the individuals who appear on these sheets, is the extent to which their information is distributed. Consumers have no way of knowing who will eventually access their information, or for what purpose.²¹⁸

Between “double banging” debtors, dealing in “PiFs,” and working lead-sheets, it is clear that, under the veil of “collections,” WNY agencies devised a well-orchestrated scam designed to defraud consumers across the country. The critical difference between these operations and other scams is that these collectors shroud fraudulent activity as legitimate employment.²¹⁹ In this way, WNY collectors slip through the cracks while authorities concentrate on higher profile, well-known scams, which in turn allows collectors to hide in plain sight.²²⁰

214. See Pls. SoMF, *supra* note 1, at 7.

215. Cf. HALPERN, *supra* note 191, at 14 (discussing collectors who were “masterful at the ‘talk-off,’” that collectors use to “encourage, shame, and intimidate [debtors] into paying.”).

216. See *id.*

217. See Davis Interview, *supra* note 7; Johnson, *supra* note 23, at 25–28.

218. See Johnson, *supra* note 23, at 25–28.

219. But see Debt Collection Fact Sheet, *supra* note 212, at 1.

220. See HALPERN, *supra* note 191, at 12–13 (“These were folks that you

C. Specific FDCPA Violations

Overall, the FDCPA does not impose a substantial burden for legally compliant collection agencies.²²¹ There are nuanced provisions, but in general, the FDCPA simply mandates that collectors act honestly,²²² refrain from harassment,²²³ and interact with debtors in a professional manner.²²⁴ The statute is fairly summarized as outlawing collectors from making any misrepresentations as to their purpose for contacting a debtor.²²⁵ These are not difficult or burdensome requirements, but simply expected as a matter of professional courtesy in the vast majority of occupations.

Parties to valid contracts are bound by an implied covenant of good faith and fair dealing.²²⁶ The securitization process, in theory, eliminates the privity upon which this implied covenant is founded because the creditor sells the debtor's obligation to repay.²²⁷ On the other hand, collection

bumped into at the grocery store, but there wasn't a whole lot of interaction because Buffalo is very stratified.").

221. See Fair Debt Collection Practices Act (FDCPA) 15 U.S.C. §§ 1692 et seq. (2010); *Ruth v. Triumph P'ships*, 577 F.3d 790, 800–04 (7th Cir. 2009) (discussing unsophisticated consumers, and describing various FDCPA violations, their elements, and presumptions).

222. 15 U.S.C. §§ 1692e–1692f (2010) (prohibiting collectors from overstating the balance owed, adding fees, interest, or other expenses not specified in the original contract, or threatening action that the collectors have no intention or no authority to take). See also 18 U.S.C. § 1342 (2017) (criminalizing the use of a fictitious name in the furtherance of fraud or unlawful business).

223. 15 U.S.C. § 1692d.

224. *Id.* § 1692c.

225. *Ruth*, 577 F.3d at 797–800 (requiring extrinsic evidence to establish whether the communication has the tendency to mislead an unsophisticated consumer.); *Gold v. Midland Credit Mgmt., Inc.*, 82 F. Supp. 3d 1064, 1071 (N.D. Cal. 2015) (noting the purpose and goals of the FDCPA).

226. See *Anserphone, Inc. v. Bell Atl. Corp.*, 955 F. Supp. 418, 431 (W.D. Pa. 1996) ("A claim for breach of the duty of good faith and fair dealing is a species of a contract claim.").

227. See *supra* notes 52–60, 72–74 and accompanying text (highlighting the securitization process and how "creditors" are distinguished from "collectors"—the former being privy to the agreement and its obligations while the latter is

agencies tacitly assume this duty when acquiring a creditor's contractual rights, but they are sufficiently removed from the debtor to ignore it without consequence. Thus, the misrepresentations collectors make to debtors violate this implicit obligation, which alone is sufficient grounds for voiding the debtor's obligation to repay arising from the obligation.²²⁸

Under the FDCPA, collectors are required to provide a "mini-Miranda" disclaimer stating that they are contacting the debtor in an attempt to collect on a debt, and any information gathered will be used for that purpose.²²⁹ Additionally, debtors are entitled to receive verification of the debt in writing from the collector.²³⁰ The logical rationale for this requirement is that individuals who dispute a debt's validity are assured of it prior to paying an unknown agency. The burden collectors face complying with the verification and disclaimer requirements is minimal. Unsurprisingly, however, rogue agencies in WNY routinely fail to comply with even minimal statutory requirements.²³¹ Far too often, collectors are unable to verify the debt, which explains collectors' wholesale disregard for minimal statutory mandates.²³²

not).

228. *Cf. Desantis v. Roz-Ber, Inc.*, 51 F. Supp. 2d 244, 249 (E.D.N.Y. 1999) (highlighting that the FDCPA seeks to impose strict liability for violations, unless the collector can demonstrate the existence of a bona fide error, and a "single violation of the Act" is sufficient to impose liability).

229. *See* 15 U.S.C. § 1692e(11); *Drolet v. Phillips Reinhard & Assocs.*, No. 14-CV-406-JTC, 2016 U.S. Dist. LEXIS 19754, at *4 n.1 (W.D.N.Y. Feb. 17, 2016) ("Specifically, plaintiff alleges that defendant's debt collection activity violated sections . . . 1692e(11) (prohibiting a debt collector from failing to disclose "mini-Miranda" warning)"); Elwin Griffith, *The Role of Validation and Communication in the Debt Collection Process*, 43 CREIGHTON L. REV. 429, 456 n.153 (2010).

230. 15 U.S.C. § 1692g (requiring proper written notice within five days of the initial communication).

231. *Drolet*, 2016 U.S. Dist. LEXIS 19754, at *3–4 n.1; HALPERN, *supra* note 191, at 89–113.

232. *See, e.g., Pls. MSJ, supra* note 3, at 26–27.

Congress mandated these requirements to ensure equity and to allow consumers an opportunity to dispute invalid debts.²³³ Holding a consumer liable for an invalid debt unquestionably contravenes equitable bargaining principles and undermines congressional intent.²³⁴ Collectors in rogue agencies, however, thrive on inequity to elevate their position relative to the consumer and compel payment.²³⁵ Thus, to avoid sending verification notices to debtors, collectors create justifications and conjure exigent circumstances rendering verification impossible.²³⁶ This is because, to bolster the appearance of exigency, collectors misrepresent themselves and their principal to appear as if they are a law enforcement agency located within the debtor's jurisdiction.²³⁷

Call "spoofing" technology allows collectors to falsify their area codes and the name appearing on the debtor's caller ID.²³⁸ Debtors located in Texas or Florida, for example, are apt to realize the collector's illegitimacy if the caller's area code originates in WNY. Even an "unsophisticated consumer" who noticed this discrepancy would second-guess the collector's legitimacy.²³⁹ Therefore, collectors use

233. See 15 U.S.C. § 1692 ("[c]ongressional findings and declaration of purpose").

234. See *id.*

235. See, e.g., HALPERN, *supra* note 191, at 14; Johnson, *supra* note 23, at 42–47.

236. Cf. Pls. SoMF, *supra* note 1, at 35–55.

237. See ASAC Sibley Interview, *supra* note 127.

238. Describing the importance of technology in facilitating debt collectors' fraudulent scheme, ASAC Sibley stated that technology makes illegal debt collection possible because consumers tend to believe information conveyed by their caller ID, especially when the collector feigns authority and they have no reason to think otherwise. ASAC Sibley Interview, *supra* note 127. See also, e.g., Pls. MSJ, *supra* note 3, at 5–6.

239. See Fair Debt Collection Practices Act (FDCPA) 15 U.S.C. § 1692e (prohibiting false or misleading statements, which does not preclude collectors' making material misrepresentations using various technology). See also, e.g., Pls. MSJ, *supra* note 3.

technology to eliminate this discrepancy and appear as if they have legitimate legal authority.

The FDCPA also limits when collectors can contact debtors' family or friends and what information they can disclose.²⁴⁰ Similarly, the FDCPA prohibits collectors from harassing either debtors or third parties.²⁴¹ Once again, WNY collection agencies rarely comply with these mandates.²⁴²

Should collectors' attempts to intimidate debtors into paying prove unsuccessful, harassment provides an alternative means through which to compel payment.²⁴³ Many consumers who dispute the debt, or are otherwise unmotivated by collectors' threats, eventually elect to pay anyway merely to alleviate collectors harassing themselves, loved ones, or employers.²⁴⁴ Moreover, disclosure limitations are intended to stop collectors from purposely attempting to embarrass the consumer or adversely influence opinions of their friends, family, or employer.²⁴⁵ When these regulations are unenforced, many consumers reach the point where paying is less costly than dealing with constant harassment.

The cost of harassment goes beyond merely the cost of enduring it; collectors will purposely harass a debtor's employer, and potentially jeopardize the debtor's

240. See 15 U.S.C. § 1692d.

241. *Id.* §§ 1692c(b), 1692d.

242. See, e.g., Pls. SoMF, *supra* note 1, at 27–60; Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman Announces \$165k Settlement with Debt Collector in Buffalo (Nov. 21, 2013), <https://ag.ny.gov/press-release/ag-schneiderman-announces-165k-settlement-debt-collector-buffalo>. [hereinafter NYAG Press Release].

243. See, e.g., *Fajer v. Kaufman, Burns & Assocs.*, 2011 U.S. Dist. LEXIS 8338, at *3 (W.D.N.Y. Jan. 28, 2011) (awarding \$500 where defendant made numerous calls to home and workplace and made empty threats of litigation); *Hance v. Premier Recovery Grp., Inc.*, 2013 U.S. Dist. LEXIS 2161, at *2 (W.D.N.Y. Jan. 7, 2013) (awarding \$500 in statutory damages where defendant called plaintiff's home on a number of occasions, totaling more than 20 times per month).

244. See e.g., *Earls Decl.*, *supra* note 104, at 1–2.

245. See 15 U.S.C. §§ 1692b, 1692c(b), 1692d.

employment.²⁴⁶ This is a calculated and effective tactic for collectors because, as noted above, individuals most susceptible to taking payday loans, or amassing substantial credit card debt, are precisely the type who cannot afford to lose their job.²⁴⁷ This situation exemplifies the rationale for prohibiting such collection tactics, which congress sought to do by enacting the FDCPA.²⁴⁸ Unfortunately, these statutory prohibitions are meaningless absent effective enforcement.

D. *Threats to Arrest*

As previously mentioned, another egregious FDCPA violation that collectors frequently employ is threatening the debtor with arrest and subsequent criminal prosecution.²⁴⁹ Threats such as these are not anomalies nor are they merely practices in which a few rogue employees engage to boost their commissions; they are incorporated into scripts that collectors are specifically directed to use when leaving messages for the debtor.²⁵⁰ One agency used the same script consistently enough that law enforcement began to identify various assumed company names the agency used by comparing nearly identical consumer complaints attributed to “different” agencies.²⁵¹ There, collectors told every debtor

246. See Pls. SoMF, *supra* note 1, at 57–59; Davis Interview, *supra* note 7.

247. See Chin, *supra* note 41, at 726–27.

248. See *Gold v. Midland Credit Mgmt., Inc.*, 82 F. Supp. 3d 1064, 1071 (N. D. Cal 2015) (quoting *Kasalo v. Trident Asset Mgmt., LLC*, 53 F. Supp. 3d 1072, 1078 (N.D. Ill (2014)).

249. See 15 U.S.C. § 1692f(3) (Prohibiting “[t]he solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.”). See generally Johnson, *supra* note 23 (describing how prevalent criminalization tactics are in the debt collection industry and why they are effective— especially when made to women).

250. See, e.g., Pls. SoMF, *supra* note 1, at 29–33, 35–48. See also Patrice Hendriksen, *CFPB and NY AG File Joint Lawsuit Against Debt Collectors*, CONSUMER FINANCE ENFORCEMENT WATCH (Nov. 4, 2016), <http://www.enforcementwatch.com/2016/11/04/cfpb-and-ny-ag-file-joint-lawsuit-against-debt-collectors/>

251. See, e.g., Pls. MSJ, *supra* note 3, at 13–16. See also *supra* note 107 and

that creditors retained their company to file a “two-part felony complaint for federal check (or wire) fraud.”²⁵² They then bolstered this threat by convincing the debtor that officers would “pick [them] up” for these charges that day, sometimes within mere hours.²⁵³ Fortunately for debtors, or so they are told, they can avoid arrest and criminal prosecution if they obtain a “court release number.”²⁵⁴ This will issue, however, only after the debtor pays.

The frequency of these threats is astonishing. In one case, out of one hundred randomly sampled audio recordings, the NYAG identified eighty calls explicitly containing a false representation.²⁵⁵ This means that within a “95% confidence interval for the frequency of false representations in calls lasting 40 seconds or greater,” 70.9% to 87.3% of calls contained a false representation.²⁵⁶ Within the same sample, collectors explicitly threatened arrest or detainment in fifty-two of these calls.²⁵⁷ This amounts to a frequency of 41.8% to 62.1% calls containing threats to arrest or detain within a 95% confidence interval.²⁵⁸

Employing such a tactic places a strict temporal limitation on a debtor’s payment, which creates a sense of urgency. This renders debtors susceptible to believing collectors when they are told that there is not enough time to validate the debt.²⁵⁹ Likewise, debtors believe that they do not have time to research the company’s legitimacy nor the

accompanying text (referencing call-spoofing technology and how its employed in the debt collection industry).

252. See, e.g., Pls. SoMF, *supra* note 1, at 48–55.

253. *Id.* at 42.

254. See, e.g., *id.*

255. *Id.* at 59.

256. *Id.*

257. *Id.*

258. *Id.* at 59–60.

259. See *id.* at 35–42 (demonstrating the short amount of time that collectors tell debtors they have to resolve the dispute before charges will be filed).

charges cited by the collector; they are focused on gathering sufficient funds to pay and avoid arrest.

Even a cursory reflection on the purported charges in many cases would reveal the collection attempt's fraudulent nature.²⁶⁰ For example, one agency alleged that they intended to file a criminal complaint for soliciting incorrect information.²⁶¹ The "charge" itself is both nonsensical and oxymoronic. How would one even attempt to solicit incorrect information? Providing incorrect information in an attempt to defraud another, of course, is a requisite element of common law fraud,²⁶² but it does not follow that someone could intentionally solicit the same in an attempt to defraud another. Yet, partially due to the debtor's ignorance of the law and partially out of fear of arrest, many victims fail to notice this inherent contradiction.²⁶³

This tactic is most repulsive when contacting consumers who do not have any outstanding debt. On the other hand, the more suspect the debt, the more aggressive the tactics and threats collectors employ to collect it.²⁶⁴ When collecting legitimate debts, legitimate collectors have legal remedies available, which gives them an incentive not to forfeit these remedies by engaging in illegal tactics.²⁶⁵ On the other hand, if the debt is illegitimate, collectors have nothing to lose; they see only greater commissions when threatening to arrest debtors who otherwise would have no incentive to pay a debt

260. See, e.g., *id.* at 35–47.

261. Cf. *id.* at 35–47, 52–54.

262. *Banque Arabe Et Internationale D'Investissement v. Md. Nat'l Bank*, 57 F.3d 146, 153 (2d Cir. 1995) ("To prove common law fraud under New York law, a plaintiff must show that (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance.").

263. See, e.g., Earls Decl., *supra* note 104, at 1–3.

264. See, e.g., HALPERN, *supra* note 191, at 14; Pls. SoMF, *supra* note 1, at 35–55.

265. See *supra* notes 70–72 and accompanying text.

that they legitimately do not owe.²⁶⁶

E. *Collectors Representing Themselves as “Attorneys,”
“Investigators,” or Law Enforcement Officials*

Attempting to substantiate their threats to arrest a debtor, frequently on imaginary charges, collectors must also misrepresent their authority to bring such charges.²⁶⁷ Thus, collectors falsely identify themselves as attorneys, local law enforcement officers, or federal agents to establish a presumption of legitimacy.²⁶⁸ Using different area codes and call spoofing technology enables collectors to maintain their apparent legitimacy.²⁶⁹ When collectors spoof calls the recipient’s caller ID, in addition to misrepresenting the area code, they can also misrepresent the organization from which the call originates.²⁷⁰ For debtors, it appears as if they are receiving a call from a law enforcement agency or district attorney’s office.²⁷¹ This misrepresentation is reinforced when the caller’s area code matches that of the debtor’s. This is why collectors maintain an overabundance of phone numbers with different area codes or employ call spoofing technology.²⁷²

When a debtor calls back into the live server, they answer as if they are a “legal processing” or law firm, which, of course, is patently false.²⁷³ Recently, one WNY agency went as far as representing itself as an agent of the NYAG; presumably in an attempt to delegitimize the organization,

266. Informant Interview, *supra* note 120.

267. *See, e.g.*, Pls. SoMF, *supra* note 1, at 29–33, 35–60.

268. *See, e.g., id.*

269. *See, e.g., id.* at 30–31, 33.

270. *E.g., id.* at 30, 33.

271. *E.g., id.* at 30–31.

272. *See, e.g., id.*

273. *See, e.g., id.* at 35–60.

and to illicit fear in the debtor.²⁷⁴ The NYAG has recovered a majority of the restitution payments pursuant to judgments obtained in WNY for unlawful collections.²⁷⁵ Fortunately for debtors, this idea backfired. Collectors' misrepresentations caused three separate debtors to inadvertently call the real NYAG's office, who then used their statements as evidence of the collections agency's wrongful conduct.²⁷⁶

Not only does the FDCPA prohibit misrepresentations such as these, but it also prohibits collectors from threatening any action that they cannot, or do not, actually intend to take.²⁷⁷ Obviously, collectors lack any authority to carry out the threatened actions, especially where there is no valid underlying debt. Rather, these collectors are typically the type who are otherwise unemployable in any legitimate business.

1. Who Collectors Really Are

In reality, a majority of WNY collectors are degenerates, gang-bangers, and/or ex-convicts, which makes them perfect for the industry.²⁷⁸ Individuals who lack any sense of morality or compassion are exactly the type who thrive in collections.²⁷⁹ The industry attracts those who have no qualms about breaking the law.²⁸⁰ An entrepreneur starting his own collection agency described the types of employees

274. See Davis Interview, *supra* note 7.

275. See *id.*

276. See *id.*

277. 15 U.S.C. § 1692e(5) provides:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section . . . [t]he threat to take any action that cannot legally be taken or that is not intended to be taken.

278. See HALPERN, *supra* note 191, at 13.

279. See *id.*

280. See *id.*

he wanted to attract as “ex-cons, drug addicts, twenty-somethings without high school diplomas, and a variety of other hard-luck cases . . . [because] the more clean-cut types simply wouldn’t get the job done.”²⁸¹ Especially in the case of ex-convicts, who are precisely the people who require documentation verifying that they are meaningfully employed to show their parole or probation officers, it is no wonder why these employees are the best “hustlers.”²⁸² Because the industry and its attending illegal practices go largely unnoticed, post-release supervision officers have no way of recognizing the difference between “telemarketing,” and fraudulent debt collection, allowing collectors to slip through the cracks.²⁸³

Given the type of individuals attracted to this industry, narcotics abuse within WNY collection agencies is pervasive.²⁸⁴ NYAG investigators, while working undercover, have observed collectors using marijuana, cocaine, and everything in between at work.²⁸⁵ Evidence indicated that some employees even injected heroin in the office.²⁸⁶ Substance abuse in these agencies is so pervasive and severe that NYAG investigators witnessed collectors “huffing” magic markers at work to ease withdrawal symptoms.²⁸⁷ Pervasive substance abuse helps explain the utter lack of morality common among WNY collectors; they will do anything to make money to feed their habits, especially when disguised as legitimate employment.

Additionally, substance abuse problems provide insight

281. *Id.*

282. *See id.*

283. *See id.* at 12–13; Davis Interview, *supra* note 7.

284. *See, e.g.,* HALPERN, *supra* note 191, at 13 (describing how a collection agency manager “had to help break up a fight that began when a collector overcharged his co-worker for a bag of cocaine.”).

285. *See, e.g., id.*; Davis Interview, *supra* note 7.

286. Davis Interview, *supra* note 7. *See also* HALPERN, *supra* note 191, at 13.

287. Davis Interview, *supra* note 7.

as to why, despite millions of dollars flowing into these agencies, collectors often attempt to unfreeze assets to pay attorney's fees when defending legal action against them.²⁸⁸ The NYAG's Senior Consumer Frauds Representative for the Buffalo Regional Office, Karen Davis, mockingly summarized the prevalence of narcotics in the WNY collection industry: "[i]t's almost hard to tell if they are laundering drug money through collections, or vice-versa; laundering [illicit debt] collection proceeds through drugs."²⁸⁹ Not that collectors could actually "launder" money through illicit means such as narcotic sales, but the point is that illegitimately acquired funds are all converted to cash and other property, which makes the proceeds difficult to trace and recover.

If the collectors' conduct described thus far is not outrageous enough, fear not—it gets worse. A substantial number of collectors receive government benefits such as Medicaid and Electronic Benefit Transfer (EBT) subsidies.²⁹⁰ In reality, collectors are relatively well-compensated, yet they not only avoid paying any income tax but actually receive government benefits because their employer does not accurately report their wages.²⁹¹ Defrauding the government is not exclusive to lower-level collectors; managers and even some collection agency owners reap whatever government benefits they can siphon from taxpayers.²⁹²

Given the callous examples of greed already addressed, collection agency owners and managers fraudulently receiving government benefits should come as no surprise.

288. See Fairbanks, *supra* note 1 (describing a Buffalo collector named Alan Ceccarelli, who, during his sentencing hearing, pleaded guilty to wire fraud and aggravated identity theft and "pointed to a decade-long addiction to cocaine, heroin, and crack cocaine as the motivation for his crimes.").

289. Davis Interview, *supra* note 7. See also HALPERN, *supra* note 191, at 12–13; Fairbanks, *supra* note 1.

290. See, e.g., Pfeiffer, *supra* note 7.

291. ASAC Sibley Interview, *supra* note 127.

292. See, e.g., Pfeiffer, *supra* note 8.

Surprising or not, it does not render the practice any less outrageous. NYAG investigators uncovered evidence of managers making over \$100,000 per year while receiving government subsidies.²⁹³ In one particularly egregious case, an agency owner's actual income exceeded \$1,250,000 for a single year, yet he still received Medicaid benefits—as did the rest of his family.²⁹⁴

Since 2010, hundreds of millions of dollars have flowed into WNY through these agencies.²⁹⁵ Collection agency owners realized that it saved them money if employees filed Internal Revenue Service (IRS) tax documents as “independent contractors,” because this frees employees from regular tax withholdings, allowing owners to manipulate both business and personal tax documents.²⁹⁶ Moreover, employees are commonly paid in cash, or they receive their paychecks from a separate, supposedly unrelated, company, so that paychecks received are not attributed to their employer's payroll expenses.²⁹⁷ Many

293. *Id.*

294. *Id.* (describing a criminal action currently pending in the Western District of New York, where, in addition to conspiracy to commit wire fraud, “[f]ederal investigators also charged [Defendant] Ciffa with health care fraud” for engaging “in a scheme to defraud Medicaid, which provides medical benefits for low-income individuals.” On an application filed with the Department of Social Services, “Ciffa claimed that he and his wife earned a combined income of \$610 a week [(\$31,720/year)].” According to federal prosecutors, in 2015, Ciffa, the “ringleader of the conspiracy . . . had a total income of \$1,284,951.04.”).

295. This figure represents a conservative estimate; the actual figure may greatly exceed a billion dollars. Davis Interview, *supra* note 7. See also Davis Decl., *supra* note 105, at 2–19; Pls. SoMF, *supra* note 1, at 84 (“Vantage Point’s corporate bank account had deposits of at least \$22,534,999.”); HALPERN, *supra* note 191, at 15.

296. See INTERNAL REVENUE SERVICE, FORM 1099-MISC & INDEPENDENT CONTRACTORS (Jan. 1, 2017), <https://www.irs.gov/help-resources/tools-faqs/faqs-for-individuals/frequently-asked-tax-questions-answers/small-business-self-employed-other-business/form-1099-misc-independent-contractors/form-1099-misc-independent-contractors> (noting the difference between a Form W-2 and a Form 1099-MISC).

297. See, e.g., Davis Decl., *supra* note 105, at 2–17 (outlining the regular transfer of funds between purportedly “separate” entities).

managers and employees stash wire transfer service and/or money order accounts to ensure that their operation continues when accounts are frozen or closed due to chargebacks.²⁹⁸ Additionally, so that the money never stops flowing, owners segregate their various business expenses so that they are paid out of different accounts.²⁹⁹ They sweep accounts almost daily so assets are not frozen, or if they are, it is a small sum.³⁰⁰

F. “Over-BiFing”

The terminology in the industry for the principal balance is referred to as the “balance in full” or “BiF.” Due to New York’s usury laws, collectors are prohibited from collecting usurious interest or fees over the principal debt.³⁰¹ Thus, especially when remitting commissions to the debt owner when working placed debt, collecting the actual balance yields noticeably smaller profits. To increase their bottom line, WNY collectors responded by “over-BiFing”—indiscriminately overstating the balance in full by including amounts prohibited by law.³⁰²

This practice is flagrantly illegal.³⁰³ Over-BiFing is so prevalent in WNY that many agencies categorically add hundreds of dollars to the balance; inflating debts and

298. See, e.g., Pfeiffer, *supra* note 8 (“Collana was an associate of Ciffa who established shell companies, payment processing accounts, and bank accounts, to facilitate taking payments from individuals.”).

299. See Davis Decl., *supra* note 105, at 2–17; ASAC Sibley Interview, *supra* note 127; Pfeiffer, *supra* note 8.

300. ASAC Sibley Interview, *supra* note 127.

301. N.Y. GEN. OBLIG. LAW § 5-501 (forbidding charging a usurious rate of interest).

302. See 15 U.S.C. § 1692(f)(1) (prohibiting “[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.”); Pls. MSJ, *supra* note 3, at 27 (alleging Defendants violated the FDCPA, N.Y. EXEC. LAW § 63(12), and N.Y. GEN. BUS. LAW §§ 349, 601(2)).

303. See 15 U.S.C. § 1692(f)(1).

collecting amounts debtors do not owe.³⁰⁴ The worst offenders quote balances that exceed six-hundred percent of the actual balance.³⁰⁵ What is more, this practice is not limited to valid debts. Contradictory as it sounds, over-BiFing occurs even when collectors know the underlying debt is invalid.³⁰⁶ In almost every case, the arbitrary amount that collectors add to the underlying debt, standing alone, violates contemporary usury laws.

Besides the obvious appeal of increasing revenue, over-BiFing serves another important purpose for rogue collection agencies—it creates a cushion for collectors. This cushion enables collectors to offer debtors the option of satisfying the full balance—a “satisfaction in full”—by paying a sum lower than the stated balance.³⁰⁷ The catch is that this satisfaction amount is still higher than the actual balance, assuming an actual balance even exists.³⁰⁸ This allows collectors to feign sympathy for the debtor and insist that they are doing everything they can to “help” by waiving or reducing fees.³⁰⁹ Convincingly, collectors engage in fictitious bartering that is, in reality, not a bargain at all; it merely lessens the monetary damages incurred by debtors—unless collectors decide to re-collect the debt.³¹⁰

304. See, e.g., Press Release, Consumer Fin. Prot. Bureau, CFPB and New York Attorney General File Lawsuit Against Illegal Nationwide Debt Collection Scheme (Nov. 2, 2016), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-file-lawsuit-against-illegal-nationwide-debt-collection-scheme/> [hereinafter CFPB & NYAG Press Release].

305. See *id.*

306. See *id.*

307. See *Carbin v. N. Resolution Grp., LLC*, No. 12-CV-1108JTC, 2013 U.S. Dist. LEXIS 126937, at *3–*5 (W.D.N.Y. Aug. 29, 2013).

308. See, e.g., *id.* at *2–*3 (“[P]laintiff obtained his credit report and saw that defendant had reported an additional alleged debt of \$850. He sent a written communication disputing the debt and requesting validation. Defendant sent a written communication in response, stating that the amount due was \$1050, but that it would waive interest and fees of \$200 and accept payment in full of \$850.”).

309. See *id.* See also *supra* note 165–171 and accompanying text

310. See *Carbin*, 2013 U.S. Dist. LEXIS 126937, at *2–*3; Informant Interview,

Similarly, collectors manifest their desire to “help” victims by offering the option of paying in installments. Once again, this is by no means a bargain. There is a caveat; the aggregate sum of installment payments amounts to a higher total than the already “over-BiFed” balance.³¹¹ This clever tactic, manifested as a benefit to the debtor, actually helps collectors maximize profits because the agency recovers more than the full amount of the “debt” on top of any excess already added in.³¹²

Finally, this installment benefit is only available to debtors who seem willing to pay but lack the funds and/or any means to acquire them.³¹³ Because impending criminal prosecution is a commonly used threat against debtors, when no such action is taken collectors’ misrepresentations become readily apparent to debtors.³¹⁴ Thus, offering installment payments is the collectors’ last “hail-Mary” attempt at recovery, in which case slowly siphoning the debtor’s money is better than forfeiting their chances of recovery altogether.³¹⁵

G. *Skip Tracing Services*

Western New York collectors, like collectors elsewhere, rely heavily on the use of skip-tracing services to locate debtors; but because WNY agencies primarily collect old or illegitimate debt, these services are critical to their

supra note 120.

311. *See Carbin*, 2013 U.S. Dist. LEXIS 126937, at *1; CFPB & NYAG Press Release, *supra* note 304.

312. *See Carbin*, 2013 U.S. Dist. LEXIS 126937, at *2–*3.

313. *See, e.g., Pls. SoMF, supra* note 1, at 23–24, 27.

314. *See, e.g., Pls. MSJ, supra* note 3, at 24–25 (“Defendants’ main tactic—as reflected in declarations, scripts, calls, complaints, and other evidence—was to falsely claim that consumers had committed a felony and would be arrested if they did not pay within a number of hours, or even minutes.” Thus, when no such action against the consumer ensued, the consumer would realize the collectors’ empty threats).

315. *See Informant Interview, supra* note 120.

operations.³¹⁶ A skip-tracing agency is defined as “[a] service that locates persons (such as delinquent debtors . . .) or missing assets.”³¹⁷ The rise of modern technology has drastically altered the nature of skip-tracing services. Creditors or collectors no longer need to utilize a skip-tracing agency to physically locate debtors—now they simply can purchase an online skip-tracing service account to locate debtors remotely.³¹⁸ For example, in its online advertisement the preferred skip-tracing service for WNY collectors, TransUnion’s TLOxp, specifically targets collection agencies and highlights the service’s ability to “locate even the hardest to reach individuals.”³¹⁹ This service allows collectors to perform their own skip-tracing for a relatively low cost without ever leaving the office.³²⁰

While skip-tracing services, such as TLOxp are greatly beneficial when used for legitimate purposes, they are also a critical element that facilitates illegal collection practices. Armed with only a name and prior address, collectors can obtain an unfathomable amount of debtors’ personal

316. See ASAC Sibley Interview, *supra* note 127.

317. *Skiptracing Agency*, BLACK’S LAW DICTIONARY (10th ed. 2014).

318. E.g., TLOxp, *The Ultimate Skip Tracking Tool that Delivers Deeper Insights*, TRANSUNION (Nov. 20, 2016, 5:40 PM), <http://www.tlo.com/collections-video> (describing the power of their service and its benefits it is for collections). See also ASAC Sibley Interview, *supra* note 127; NYAG Press Release, *supra* note 247.

319. TLOxp, *supra* note 318. TLOxp’s online advertisement description of its services states:

TLOxp is a skip tracing solution that provides fresher, more timely contact data so you can reach consumers earlier in the collections cycle and recover more dollars. Now that TLOxp® has joined TransUnion’s portfolio of solutions, the next generation in deep skip tracing tools contains information on an estimated 95% of the U.S. population. Leverage our massive data repository and unmatched linking algorithms to locate even the hardest to reach individuals and businesses that owe debt. TLOxp returns critical data on key debtor information such as current phone numbers, addresses, relatives, associates, place of employment and much more at the lowest transactional costs in the industry. *Id.*

320. See *id.* (“TLOxp returns critical data . . . at the lowest transactional costs in the industry.”).

information.³²¹ This information serves as a basis for collector's misrepresentations.³²² Debtors are inherently apt to believe that the collector is legitimate when the caller knows information such as their current address, license number, and social security number.³²³

To make matters worse, remote skip-tracing service providers either lack sufficient oversight procedures to monitor their product's use, or the procedures currently employed are grossly insufficient to ensure that subscribers comply with the terms and conditions of permissible use.³²⁴ Likewise, these service providers lack pre-screening procedures for potential subscribers—instead, they offer a free trial subscription to essentially anyone interested in their service.³²⁵

The only readily identifiable oversight procedure skip-tracing service providers purportedly employ is to monitor users' internet service provider (ISP) address. Ideally, this measure allows only one subscriber to login at a time.³²⁶ Given modern technology, however, this "oversight" is entirely ineffective. Nearly all WNY agencies set up their system such that one collector can sign into the software

321. *See id.*

322. *See, e.g.,* HALPERN, *supra* note 191, at 14–15 (describing how collectors can use consumers' information obtained through skip-tracing software to influence the consumer into paying). *See also* TLOxp, *supra* note 318.

323. *See* TLOxp, *supra* note 318; HALPERN, *supra* note 191, at 14–15.

324. *See* FED. TRADE COMM'N, COLLECTING CONSUMER DEBT: THE CHALLENGES OF CHANGE 18–20 (2009), https://www.ftc.gov/sites/default/files/documents/public_events/debt-collection-2.0-%E2%80%93protecting-consumers-technologies-change/dcw.pdf.

325. *E.g.,* TLOxp, *supra* note 318 (“If you’re new to TLOxp, Try [sic] it out for FREE* and witness the difference powerful searches can make.”). In fact, while conducting research for this Comment, not only was I unable to find any reference to any standards for screening subscribers to ensure their product's legitimate use, but I personally received a phone call from a TLO representative, who wanted to offer me a seven-day free trial service subscription after I visited their website.

326. Informant Interview, *supra* note 120 (stating that this informant had a TLO account that the entire office used).

while the rest of the office accesses the account remotely.³²⁷ To monitors, this appears as a single subscriber using a known ISP address when, in reality, the entire office has access to the software.³²⁸

The critical role skip-tracing software plays in WNY collection agencies' fraudulent scheme cannot be overstated. Many illegal practices described in this Comment are only possible through the use of skip-tracing software.³²⁹ Without access to this software, collectors could not "scramble" portfolios nor collect off lead-sheets because they would lack sufficient information to even contact their intended victims.³³⁰ Or, even if collectors could contact their target, they would lack sufficient knowledge about the target's personal information to render their misrepresentations remotely plausible.³³¹

Relatedly, the aggregate potential for harm that such unfettered access to consumers' personal information may cause remains unknown. What is clear is that the possibilities are endless for creative criminals.³³² To reiterate, most collectors are far from model citizens; in fact, many already have extensive criminal backgrounds.³³³ Access to this degree of information promotes an environment ripe for identity theft.³³⁴ These risks are more than just unsettling; for those who are particularly at risk, the ramifications are terrifying. Imagine, for example, the potential risk for a domestic violence victim if their abuser

327. *See id.*

328. *See id.*

329. *See* ASAC Sibley Interview, *supra* note 127 ("Without technology [criminal debt collection activity] doesn't happen . . . [t]echnology drives the case.").

330. *See supra* Section III.B.

331. *See* HALPERN, *supra* note 191, at 14; Davis Interview, *supra* note 7.

332. *See, e.g.,* ASAC Sibley Interview, *supra* note 127.

333. *See supra* Section III.E.1; HALPERN, *supra* note 191, at 13–14.

334. *See* HALPERN, *supra* note 191, at 7.

could obtain all of their personal information.³³⁵ While the extent of these risks is not yet known, one thing is certain—they are unacceptable.

IV. ISSUES FOR LAW ENFORCEMENT AGENCIES

Buffalo stands alone in the debt collection industry.³³⁶ Surely there are collection agencies engaging in illegal practices elsewhere, but these occurrences are far more isolated and pale in comparison to those occurring in WNY.³³⁷ Once the debt collection boom began, it did not take long for the proverbial floodgates to open and for illegal practices to spread like wildfire across the region.³³⁸ Shortly thereafter, the FTC, CFPB, and NYAG's Buffalo Regional Office started receiving an unprecedented number of consumer "third party debt collection" complaints.³³⁹

Curiously, Buffalo stood alone—no other NYAG regional office received more than a handful of debt collection complaints.³⁴⁰ At this time, the NYAG's database did not even have a classification code for these complaints. Without complaints appearing elsewhere in the state, debt collection appeared as a relatively insignificant, isolated problem, so enforcing collection laws took a backseat to seemingly more-pressing illegal activities. This allowed unlawful conduct to

335. *Cf.* Johnson, *supra* note 23, at 24–28 (describing the predatory tactics, which Johnson argues that disproportionately and adversely affect women, who may be more susceptible to these practices. The same disparaging effects flow from unfettered access to information, but, in this case, the devastating effects could prove disastrous far beyond pecuniary harm).

336. *See supra* notes 77 & 136 and accompanying text. *See generally* HALPERN, *supra* note 191, at 12.

337. Illegal collection tactics also occur in other geographic areas, but not at the rate or regularity that they occur in WNY. *See generally* Johnson, *supra* note 23 (noting throughout the article that collectors from outside WNY are engaging in similar tactics).

338. *See supra* note 77 and accompanying text.

339. *See generally* CFPB DATABASE, *supra* note 126; Davis Interview, *supra* note 7.

340. Davis Interview, *supra* note 7.

permeate the region, rapidly increasing in both severity and pervasiveness.³⁴¹ Employees fired for violating collection laws would simply move on to another agency where they introduced the same illegal tactics.³⁴² Then, noticing their new coworker's success, other employees naturally adopted the same tactics.³⁴³

If these illegal practices are so pervasive among WNY collection agencies, the question naturally follows: why hasn't law enforcement done something to stop it? The short answer is that law enforcement agencies are trying, but lack the resources to do so effectively. This answer does not sufficiently address the complexities of the problem however.

First, regarding criminal conduct, these offenses frequently go unnoticed in the region because New York outlawed payday lending and collection within the state.³⁴⁴ This prohibition conceals collectors' illegal conduct from law enforcement officials in the region,³⁴⁵ allowing collectors to fly under law enforcement's radar, and coincidentally enables the industry's isolated boom in WNY.

The New York prohibition only protects New Yorkers. Collectors may collect payday loans from New York State as long as the target debtor resides elsewhere.³⁴⁶ This distinction creates an environment tailored to this type of

341. See, e.g., Pls. SoMF, *supra* note 1, at 27–60. See generally HALPERN, *supra* note 191.

342. See HALPERN, *supra* note 191, at 14–15.

343. See *id.* (discussing the tendency of collectors to simply move from agency to agency).

344. See N.Y. PENAL LAW § 190.40; N.Y. BANKING LAW §§ 340, 373.

345. See Davis Interview, *supra* note 7 (discussing interactions with local law enforcement, Ms. Davis stated: “They simply have no clue how the industry functions. Collectors go to their parole officers’ who don’t second-guess [the collectors] when they say they work in “telemarketing” or “customer service;” what else would they say—I’m point-caller.”).

346. New York State Dep’t of Fin. Servs., *Payday Lending in New York: What You Need to Know* (May 15, 2014, 11:01 am), <http://www.dfs.ny.gov/consumer/paydayloans.htm> (“It is also illegal for a debt collector to collect, or attempt to collect, on a payday loan in New York State.”) (emphasis added).

criminal activity because it segregates victims from the collectors who prey on them.³⁴⁷ Already overworked, local law enforcement officials' primary concern is protecting their local constituency. Despite the flagrant criminality occurring within their jurisdiction, a dearth of victims blinded local law enforcement officials to the fraudulent conspiracy afoot.³⁴⁸ Even if local officials had realized the degree of illegal activity occurring sooner, they could not have afforded to allocate sufficient resources to remediate the problem at their constituents' expense.³⁴⁹ Local officials are primarily concerned with protecting local constituents, and rightfully so. This is especially true for elected officials who count on constituents' votes for reelection.

This is not to say that public officials condone or willfully ignore ongoing criminal activity within their jurisdiction. On one hand, victims, who are nearly universally located outside New York, are unlikely to report complaints in WNY.³⁵⁰ On the other hand, local police or district attorneys' offices, for example, simply have too many local cases to refocus their attention.³⁵¹ Thus, the effect is two-fold: lacking a substantial number of victim reports, local officials do not realize the gravity of harm caused by collectors, but even if they did, rarely can local officials allocate sufficient time and resources to conduct a thorough investigation.³⁵²

The limited number of complaints trickling back to local authorities fails to paint an adequate picture of the pervasive

347. See Neil Bhutta et. al., *Consumer Borrowing After Payday Loan Bans*, 59 J. L. & ECON. 225, 227 (2016).

348. See, e.g., Davis Interview, *supra* note 7.

349. See, e.g., *id.*

350. See CFPB DATABASE, *supra* note 126.

351. See Press Release, N.Y. State Office of the Attorney Gen., A.G. Schneiderman Releases New York's Top Ten Frauds of 2016, Warns Consumers to Beware of Scammers (Mar. 6, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-releases-new-yorks-top-ten-frauds-2016-warns-consumers-beware-scammers>.

352. See Davis Interview, *supra* note 7.

fraudulent conduct.³⁵³ Viewed in isolation, no matter how sympathetic the victim or egregious the collector's conduct, complaints are written off as rare occurrences perpetrated by a handful of rogue collectors.³⁵⁴ With local officials' scarce time and resources already extended to their outer limits, the costs attending complex, time-consuming investigations clearly appear to outweigh the benefits when there are no local victims.

The inter-state nature of this fraudulent debt collection scheme hinders both criminal and civil actions.³⁵⁵ For example, New York General Business Law § 349 expressly prohibits any "[d]eceptive acts or practices in the conduct of any business, trade or commerce."³⁵⁶ Courts have afforded Section 349 broad construction, interpreting any consumer-oriented business practice having the "capacity to mislead or deceive a reasonable person" sufficient for establishing a statutory violation.³⁵⁷

On the other hand, while the NYAG's powers are expressly confined to specific matters, they are particularly narrow in the context of criminal prosecution.³⁵⁸ This

353. *See id.* (noting that because they lack familiarity with the industry, local authorities fail to fully grasp the extent of debt collectors' fraudulent scheme even when complaints are received).

354. *See* Davis Interview, *supra* note 7. While the CFPB receives substantial complaints regarding Buffalo debt collectors, local enforcement agencies often do not receive them. *See generally* CFPB DATABASE, *supra* note 126.

355. *See* Kaufman v. Sirius XM Radio, Inc., 751 F. Supp. 2d 681, 686–88 (S.D.N.Y. 2010) (pointing out that N.Y. Gen. Bus. Law § 349 does not extend to cases where a deceptive scheme originates in N.Y. but injurious consumer transaction occurs elsewhere).

356. N.Y. GEN. BUS. LAW § 349(a).

357. *Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 606 (N.Y. 1999).

358. *People v. Goldsweir*, 358 N.Y.S.2d 814, 817 (Schoharie Cty. Ct. 1974) (highlighting that legislative action has expressly limited the general jurisdiction prosecutorial power conferred unto the Attorney General to cases where certain conditions precedent are met). *But see* *People v. General Electric Co., Inc.*, 756 N.Y.S. 2d 520, 523 (N.Y. App. Div. 2003) (noting that N.Y. EXEC. LAW § 63(12) authorizes the Attorney General to take legal action protecting consumers from acts that have "the capacity or tendency to deceive, or creates an atmosphere

reaffirms the principle that the NYAG's duties are primarily civil.³⁵⁹ Under Section 349, the NYAG is empowered to, and frequently does, pursue civil actions to seek restitution for victims of consumer fraud perpetrated within the state.³⁶⁰ The statute's primary purpose is to provide a remedy for any victims of consumer fraud. However, the NYAG's primary duty is to the people of New York. For this reason, the NYAG alone cannot utilize the statute's broad scope while adequately upholding its duty to the people of New York.

Exacerbating this, the illegal conduct is isolated to WNY, and the NYAG's Buffalo Regional Office has a single attorney responsible for the entire Consumer Fraud Bureau. Likewise, NYAG criminal prosecutors cannot divert attention from their substantial caseload. Thus, like local authorities, scarce resources preclude the NYAG from undertaking the type of comprehensive legal action, criminal or civil, necessary to adequately enforce consumer protection laws regulating debt collection.

In addition to the NYAG, New York General Business Law § 349 provides a private cause of action for actual victims harmed by deceptive or fraudulent business practices.³⁶¹ Unfortunately, for these victims, more often

conducive to fraud."); *State v. Princess Prestige*, 366 N.E. 2d 61, 62 (1977).

359. *But see Gaidon*, 725 N.E.2d at 603 (stating that N.Y. Gen. Bus. Law § 349 expressly confers unto the Attorney General "enforcement power to curtail deceptive acts and practices—willful or otherwise—directed at the consuming public"); *In re Prudential Advert. Inc. v. Attorney Gen.*, N.Y.S.2d 491, 492–93 (N.Y. App. Div. 1964) (noting that, under N.Y. EXEC. LAW § 63(12), the Attorney General "clearly is authorized to investigate alleged repeated acts committed in the course of the conduct of business activities in this State which are fraudulent within the meaning which the law by common usage attaches to that word.").

360. *See* N.Y. GEN. BUS. LAW § 349(b) (empowering the Attorney General to bring actions against any legal entity engaging in deceptive practices and to "obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices.").

361. N.Y. EXEC. LAW § 63; N.Y. GEN. BUS. LAW § 349; *Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 413–14 (S.D.N.Y. 2004) (delineating the elements a plaintiff must establish under § 349, and noting that § 349 is modeled after section 5. of the Fed. Trade Comm'n Act (FTCA)).

than not, legal recourse is not a viable option to obtain restitution. Between fictitious agency names, call spoofing technology, collector aliases, and constantly changing phone numbers with various area codes, consumer-victims are fortunate just to figure out the collectors are located in New York—never mind locate a physical address at which to serve collectors.³⁶²

In addition, because of collectors' misrepresentations, consumers believe that these collectors actually are law enforcement officials located in their own jurisdiction.³⁶³ Assuming a consumer-victim actually could identify and locate the collectors, more often than not consumer-victims lack the resources to travel to New York and pursue even a small claims action, much less hire an attorney to represent them in civil litigation.³⁶⁴

Further limiting consumer-victims' access to legal recourse, Section 349 only provides a cause of action for those who have suffered actual pecuniary harm.³⁶⁵ Harassment alone is insufficient for consumers to seek relief. More importantly, prudent consumers who do not pay are unlikely to even report unlawful collection attempts because they didn't suffer any pecuniary harm.³⁶⁶ This hinders law enforcement because consumers who had the wherewithal to realize the collector's fraudulent purpose are the ones most likely to retain useful information that could aid law

362. See, e.g., Pls. SoMF, *supra* note 1, at 29–35.

363. ASAC Sibley Interview, *supra* note 127 (“call spoofing technology that allows your caller id to show that you’re from the town court, or a law office, or the judges’ office, or the police department, you know people tend to believe what they see and when your caller id says you’re from the police department . . .”) See also Pfeiffer, *supra* note 8.

364. See Chin, *supra* note 41, at 727–28.

365. *Bildstein*, 329 F. Supp. 2d at 415 (holding that actual damages are a requisite element of § 349). *But see* 15 U.S.C. § 1692(k) (2011) (allowing the court to grant, “in the case of any action by an individual,” additional damages up to \$1000).

366. See *Bildstein*, 329 F. Supp. 2d at 415.

enforcement.

Another issue for individual consumer-victims is that a legal defense exists, which provides an exception for process who act merely as agents of their principal—the legally responsible party.³⁶⁷ Collectors have recently stretched this to its logical extremes. While attorneys can overcome this defense without much difficulty, for private consumer-victims who lack the time and resources to hire an attorney private litigation becomes even more difficult and expensive.³⁶⁸

Even where authorities can allocate sufficient resources to conduct an investigation and obtain a judgment or consent order enjoining illegal practices and providing restitution for victims, this does little to actually resolve the problem. One reason is that judgments only affect the agency and possibly a few higher-up individual defendants. Such a judgment is entirely ineffective for enjoining individual collectors—the ones actually engaging in the unlawful conduct.³⁶⁹

There is a disconnect here. Collectors are most successful when they violate the law, which reflects in their paychecks. Yet, they are entirely unaffected by a judgment enjoining the agency or their superiors from engaging in fraudulent acts.³⁷⁰ These collectors can simply move on to another collection agency. Civil actions, therefore, do not impact collectors in the slightest and, undeterred, their conduct

367. *See* Sykes v. Mel Harris & Assocs., LLC, 757 F. Supp. 2d 413, 423 (S.D.N.Y. 2010).

368. *See id.* at 423 (explaining that the process sever exemption does not apply to those who go “beyond being merely being a messenger . . . and engages [sic] in prohibited abusive or harassing activities to force an individual to repay a debt.”).

369. *See generally id.*

370. *Cf.* NYAG Press Release, *supra* note 242 (discussing a lawsuit the Attorney General won against a debt collection agency). *But see* Davis Interview, *supra* note 7 (insisting that while the Attorney General won that lawsuit, the Buffalo Regional Office’s Bureau of Consumer Frauds and Protection has uncovered evidence indicating that many of the collectors are still working in the industry).

continues. In this way, acting alone, the NYAG's efforts achieve no better results than a dog chasing its tail; "catching" the problem doesn't make it go away.

In sum, by prohibiting payday lending, New York has effectively protected its own citizens while simultaneously providing a *de facto* safe-harbor for collectors' flagrantly fraudulent activity. On top of that, the complex, interstate nature of these cases present obstacles for local authorities attempting to enjoin illegal and deceptive practices. Collectors wantonly violate the law, but the violations are not reported to WNY officials who have jurisdiction over the wrongful actors.

It then follows, assuming that state and local officials cannot adequately monitor, prevent, or enjoin fraudulent activity for various reasons, that enforcement would logically fall unto a federal agency.³⁷¹ Once again, the uniqueness, infancy, and isolation of this fraudulent industry poses significant barriers for federal agencies. Few, if any, victims think to report illegal collection tactics to federal agencies such as the Federal Bureau of Investigation (FBI), U.S. Department of Homeland Security (DHS), or even the Secret Service—all of whom have jurisdiction to investigate and prosecute these crimes.³⁷² Again, without receiving complaints, these agencies are too attenuated from the unlawful conduct to recognize its pervasiveness in the region.³⁷³

Federal agencies' broad jurisdiction enables them to investigate various criminal operations throughout the country, but the WNY debt collection industry presents

371. See ASAC Sibley Interview, *supra* note 127 (highlighting that federal enforcement agencies are critical in conducting debt collection investigations).

372. Davis Interview, *supra* note 7 ("who would think to call Homeland? People think of Homeland [Security] and they think 'what does debt collection have to do with terrorism?'").

373. While federal agencies (the FTC & CFPB) compile and monitor complaints, they do not have criminal enforcement power. See CFPB DATABASE, *supra* note 126; ASAC Sibley Interview, *supra* note 127.

unique challenges that agents do not regularly encounter. They are entirely unfamiliar with debt collection, especially the operational schemes unique to WNY. While these agencies are great at investigating and prosecuting a wide variety of criminal enterprises, the complex nature of this industry along with the collection agencies' efforts to conceal illegal practices in a shroud of legitimacy effectively inhibit federal agents from recognizing the illegality attending debt collection in the WNY region.³⁷⁴

The mere conceptualization of where to start investigating is difficult in debt collection cases.³⁷⁵ Consumer complaints are often the only evidence at the onset of a case.³⁷⁶ While these complaints are necessary to demonstrate the illegal and malicious nature of collection attempts, consumers inadvertently throw "red herrings" into their complaints because they do not know what information is pertinent to an investigation. Conversely, other consumer complaints lack pertinent evidence, which is precisely why private individuals are rarely successful obtaining restitution through private litigation.

To succeed in either a civil action or criminal charge, the complaining party must unravel a confusing maze of fictitious "company" names, phone numbers, payment processing accounts, and aliases.³⁷⁷ The process of doing so

374. See ASAC Sibley Interview, *supra* note 127.

375. See generally DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION, (2009), https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf.

376. See Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895, 896–98 (2015).

377. *FTC v. Vantage Point Servs., LLC et al.*, No. 15-CV-0006-WMS-HKS, 2017 U.S. Dist. LEXIS 111084, at *2 (W.D.N.Y. July 17, 2017) (describing the amount of evidence gathered pursuant the FTC and NYAG's motion for summary judgment against a debt collection operation, the Judge stated: "[t]he [Plaintiff's] SOF attaches 470 exhibits totaling more than 1,500 pages. The exhibits consist of excerpts from Defendants' depositions, consumer declarations, correspondence, business records, telephone recording transcriptions, discovery responses, and other evidence concerning the Defendants' alleged unlawful debt collection practices.").

is not only time consuming, but also requires familiarity with these companies' business structure, which is by no means intuitive. Another problem is that collectors are careful to not reveal their true identities or physical address to either consumers-victims or law enforcement officials.³⁷⁸ If they do provide an address, it invariably leads to a P.O. box that frequently is located in another state.³⁷⁹ If nothing else, collectors are at least consistent in maintaining their misrepresentations that they are located outside of New York.³⁸⁰ Thus, to render the representation plausible, collection agencies will establish mailing addresses by purchasing P.O. boxes in many different states.³⁸¹

Another issue is that these companies change their names, at least as far as the name stated to debtors, incredibly often.³⁸² This makes locating them difficult. Moreover, the frequency with which these companies misrepresent their company names exacerbates difficulties locating their physical address, payment processing accounts, and phone numbers because all of these are tied to various fictitious or assumed company names. This can easily ensnare investigators attempting to untangle such a web. When the company is actually located, however, due to the frequency that these agencies "stash" corporation names, bank accounts, and payment information, the physical

378. *See, e.g.*, 29 AM. JUR. 2D *Evidence* § 819 (noting that "[a] defendant's attempt to hide his or her identity may be admissible as bearing on the consciousness of guilt," which should say a lot about collectors who absolutely refuse to disclose their name, company name, or address). *See also* Davis Interview, *supra* note 7 (stating that collectors use a different name nearly every week).

379. Pls. SoMF, *supra* note 1, at 33–34.

380. *See, e.g., id.*

381. *See, e.g., id.* at 33–34. *Cf.* Earls Decl., *supra* note 104, at 1 (misrepresenting to a Florida consumer that "Governor Rick Scott had recently signed a bill to allow Florida criminals to be extradited from Florida to Michigan." The collector went on to say that "[h]e was coordinating with the state of Michigan on [the consumer's] case, and that if [the consumer] didn't pay, [he] would serve 76 months in a Michigan penitentiary.").

382. *See, e.g.*, Pls. MSJ, *supra* note 3, at 5–7.

location does not help trace the funds generated because collectors can move funds and switch accounts at will.³⁸³

Finally, the structure that these agencies employ to effectuate their scheme helps insulate them from liability.³⁸⁴ On paper, they segregate collectors' illegal tactics from debt owners and the collections from the payment processor; all of which are working as part of a conspiracy.³⁸⁵

While local WNY prosecutors lack victims to charge criminal collectors under New York Law,³⁸⁶ prosecutors located within victims' jurisdiction fail to realize the extent of the harm caused because there are few victims within their jurisdiction as well. Collectors rely on this systematic anonymity.³⁸⁷ Anonymity is easily achieved when isolated incidents are viewed as such because the harm this scheme causes appears relatively small unless it is viewed aggregately.³⁸⁸

Collectors attack vulnerable individuals and demand relatively small sums to avoid detection.³⁸⁹ Seeing only one or two victim complaint(s), foreign District Attorney's offices cannot justify the substantial effort required to bring

383. See, e.g., Pfeiffer, *supra* note 8. See generally Davis Decl., *supra* note 105, at 2–19 (outlining the complex monetary transfers between “distinct” companies involved in a common criminal enterprise).

384. See, e.g., Pls. MSJ, *supra* note 3, at 13–16.

385. See *FTC v. Vantage Point Servs., LLC et al.*, No. 15-CV-0006-WMS-HKS, 2017 U.S. Dist. LEXIS 111084, at *16–*21 (W.D.N.Y. July 17, 2017) (outlining the factors relevant for establishing a common enterprise—“(1) maintain officers and employees in common, (2) operate under common control, (3) share offices, (4) commingle funds, and (5) share advertising and marketing (internal citations omitted)” —and, finding a material issue of fact as to each element, denying plaintiffs' motion for summary judgment).

386. N.Y. PENAL LAW § 190.60(2) (2016).

387. See, e.g., Pls. MSJ, *supra* note 3, at 13–16.

388. See ASAC Sibley Interview, *supra* note 127.

389. See generally Ian Ayers et al., *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints*, 19 FORDHAM J. CORP. & FIN. L. 343 (2014) (demonstrating that this issue is only trivial when viewed in isolation, but a massive fraudulent scheme is readily apparent when viewed aggregately).

collectors to justice for stealing only a few hundred dollars.³⁹⁰ That does not even address the jurisdictional issues likely to arise in such a scenario, which renders victims without recourse should they want to press criminal charges.³⁹¹ Thus, it falls to civil bureaus to enforce civil consumer protection laws despite many of the violations' criminal nature.

CONCLUSION: MOVING FORWARD, WHAT CAN BE DONE?

The interstate nature of fraudulent debt collection practices calls for federal criminal enforcement.³⁹² This solution, however, creates a dichotomy not only between civil and criminal agencies but also State and Federal. The FTC and CFPB, both federal agencies, are the ones receiving and monitoring consumer complaints, yet both lack criminal enforcement powers.³⁹³ None of the federal agencies with criminal enforcement powers, such as the FBI or DHS, monitor consumer complaints. This leaves them in the dark regarding pervasive criminal conduct necessitating investigation. Moreover, all of these federal agencies lack sufficient familiarity with the issues unique to the WNY region.

Conversely, local or state agencies with this familiarity lack adequate resources and a sufficient number of victims to justify a lengthy, criminal investigation.³⁹⁴ Readily apparent is the need for multi-agency cooperation and communication before law enforcement can combat the region's ongoing criminal conduct. Without multi-agency cooperation or allocating sufficient resources for

390. *See generally id.*

391. *See* ASAC Sibley Interview, *supra* note 127.

392. ASAC Sibley Interview, *supra* note 127.

393. *See, e.g.,* CFPB DATABASE, *supra* note 126. *See generally*, Littwin, *supra* note 376.

394. Davis Interview, *supra* note 7 ("There should be a whole team dedicated to these investigations. Instead, it's just me doing this while trying to fulfil my other employment duties.").

investigations, illegal practices will continue undeterred; “it’s like playing ‘whack-a-mole,’” when one goes down, two more spring up.³⁹⁵

Joint investigations are the way forward if enforcement agencies are serious about eliminating, or at least greatly reducing, illegal collection tactics. But even multi-agency cooperation presents new obstacles for law enforcement officials.

The first is the distinction between criminal and civil enforcement agencies or bureaus. Civil agencies operate under different rules than their criminal counterparts. For example, while the NYAG has the power to issue subpoenas in both civil and criminal matter, only its criminal divisions are empowered to obtain search and seizure warrants.³⁹⁶ Similarly, state and federal agencies also operate under different standards. When involved in a joint investigation, both state and federal agencies must proceed carefully to verify that they permissibly disseminate evidence uncovered with each other to ensure that shared materials are not tainted as evidence.

The Organized Crime Control Act of 1970 (OCCA), for example, “prohibits the use in evidence of any intercepted communications or evidence derived therefrom if the disclosure of such information would be in violation of the wiretap statute.”³⁹⁷ When enacted, Congress intended to protect an individual’s Fourth Amendment rights.³⁹⁸ These

395. ASAC Sibley Interview, *supra* note 127.

396. See N.Y. EXEC. LAW § 63(8) (empowering the Attorney-General’s office to issue subpoenas *duces tecum* and to possess and retain subpoenaed materials in accordance with the provisions of the N.Y. C.P.L.R. 2305(c). Furthermore, N.Y. CRIM. PROC. LAW § 610.25 provides the bounds of reasonable possession and retention of subpoenaed documents in the context of criminal investigations. See also, e.g., *Hynes v Moskowitz*, 377 N.E.2d 446, 449 (1978).

397. *In re Kan. City Star Co.*, 527 F. Supp. 70, 76–77 (W.D. Mo. 1981), *vacated on other grounds* 666 F.2d 1168 (8th Cir. 1981) (highlighting that Congress intended for the Act to protect “oral communications”).

398. See 18 U.S.C. §§ 2510(11), 2518(10)(a).

legislators could not possibly have foreseen technological developments rendering OCCA protections much broader than originally intended. For the purposes of the OCCA, Congress' defined "wire communication" as:

[A]ny aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.³⁹⁹

Currently, this broad definition applies to any data stored in cyberspace—including nearly all data stored in "the cloud." Anything that could even remotely be construed as a "communication" meets this definition. Collection software electronically preserves collectors' notes entered in debtors' accounts. Because other collectors can see each other's notes in the software, courts could reasonably conclude that these notes are "communications" within the OCCA's definition.⁴⁰⁰ Thus, criminal agencies, even with a valid warrant, could potentially taint any evidence shared with any civil agencies working in conjunction with them.

The good news is that enforcement agencies at the local, state, and federal levels have all begun to realize the need for remedial action.⁴⁰¹ Collectors' pervasive illegal conduct is slowly gaining more attention from local police as well as agencies such as the NYAG, FTC, CFPB, DHS, and FBI. These agencies are realizing both the necessity and utility of

399. 18 U.S.C. § 2510(1) (2017).

400. A broad reading of this statute clearly renders collections software with the ambit of the statute, but not even remotely in the spirit of the law. *See id.*

401. *See, e.g.,* Gene Warner & Jerry Zremski, *Buffalo Debt Collector Pleads Guilty in Massive Fraud*, BUFF. NEWS, Nov. 2, 2016, <https://buffalonews.com/2016/11/02/head-buffalo-debt-collection-agency-pleads-guilty-fraud/>; *Guilty Pleas by 4, Charges Against 11 Announced in Federal Fraud Prosecution of Buffalo Debt Collectors*, BUFF. NEWS, Oct. 27, 2015 <http://buffalonews.com/2015/10/27/guilty-pleas-by-4-charges-against-11-announced-in-federal-fraud-prosecution-of-buffalo-debt-collectors/>.

joint investigations.⁴⁰² Unfortunately, such realizations needed to come earlier when illegal practices had yet to permeate the vast majority of WNY collection agencies.

To date, prosecutors have only obtained a few criminal convictions against Buffalo-based debt collectors; the convictions being for criminal offenses such as wire fraud or aggravated identity theft.⁴⁰³ This is a step in the right direction, but criminal prosecution cannot stop at a few convictions if authorities want to remediate the widespread illegality occurring in the industry. Nor can officials charge only those in supervisory roles, such as agency' managers and owners, while allowing the collectors actually making calls to escape unscathed. Proceeding in this manner only pushes these collectors to move on to another agency, where they introduce and perpetuate the illegal tactics to which they are accustomed.⁴⁰⁴

Across WNY, the universal theme is that illegal collections all revolve around a "scheme or artifice to defraud."⁴⁰⁵ The managers and owners are typically the ones held accountable for devising such a scheme or artifice, but that does not excuse individual collectors from intentionally perpetrating one or more specific fraudulent acts within the scheme, including mail-fraud,⁴⁰⁶ wire-fraud,⁴⁰⁷ health-care fraud,⁴⁰⁸ government benefit fraud,⁴⁰⁹ aggravated identity

402. See ASAC Sibley Interview, *supra* note 127; Vaughters, *supra* note 43.

403. See DOJ Press Release, *supra* note 51; Phil Fairbanks, *Buffalo Debt Collectors Accused of Taking in 'Tens of Millions' by Harassing Consumers*, BUFF. NEWS, Nov. 2, 2016, <https://buffalonews.com/2016/11/02/buffalo-debt-collector-accused-harassing-consumers/>; Fairbanks, *supra* note 1.

404. See *supra* note 194–197 and accompanying text.

405. See 18 U.S.C. § 1346 (2017) (defining a "scheme or artifice to defraud").

406. See §§ 1037, 1341 (criminalizing both mail fraud and electronic mail fraud).

407. See § 1343.

408. See § 1347.

409. See 42 U.S.C. §§ 608–609 (2017) (defining public assistance fraud and the penalties for violations).

theft,⁴¹⁰ tax evasion,⁴¹¹ and/or money laundering.⁴¹² Given collectors' apparent desire to perpetrate any and every kind of fraud, law enforcement officials ought to respond accordingly by prosecuting each and every culpable participant.⁴¹³

Criminally prosecuting lower level employees who intentionally commit criminal acts would demonstrate that such acts will no longer go unpunished. Simply being a point-caller, for example, who did not devise the scheme, should not exonerate an individual from culpable participation in such a fraudulent scheme. Additionally, with smaller operations the NYAG and local District Attorneys' offices ought to assume the responsibility for bringing criminal charges against collectors under New York law.⁴¹⁴

New York should also require licensing for agencies regularly involved in debt brokering or collecting. Ideally, licensing requirements would allow law enforcement to monitor collection agencies, their tactics, and employees.⁴¹⁵ Registration and licensing requirements, if implemented

410. See 18 U.S.C. § 1028A.

411. See 26 U.S.C. § 7201 et seq. (criminalizing specific acts relating to tax evasion).

412. See 31 U.S.C. § 5342 (2017).

413. Collectors in WNY are apparently very familiar with the criminal justice system—they do represent themselves as lawyers after all—so defending a “two-part federal criminal complaint,” just like one that they threatened victims with, shouldn’t burden them much at all, right? *But see* Fairbanks, *supra* note 1 (describing Alan Ceccarelli’s 78-month federal prison sentence for engaging in abusive and unlawful collections, which seems ironically similar to the threats he made against victims of his collection scheme).

414. See N.Y. PENAL LAW §§ 190.25, 190.26, 190.50, & 190.60; N.Y. GEN. BUS. LAW §600 et seq. (providing that violating New York collection laws, which are nearly identical to the FDCPA, amounts to a misdemeanor offense).

415. Employees misstate their position as “customer service representatives” or “telemarketers,” which allows them to maintain employment in a position they should not be in. Registration could potentially preclude many ex-convicts from having access to skip-tracing software. Likewise, this could make it much more difficult for collectors to defraud public assistance programs. See Davis Interview, *supra* note 7.

correctly, would also require collection agencies to disclose their physical operating location. Likewise, licensing should also require collectors to disclose all active phone lines, and notify the state regulating agency within forty-eight hours of any changes. However, there are two shortcomings accompanying registration and/or licensing requirements for debt collection agencies. First, implementing such a system is potentially costly. Second, even with a licensing or registration process in place, the registry alone is useless without adequate oversight.⁴¹⁶

Further legislative action could aid law enforcement officials in investigating illicit debt collection operations. Both Congress and New York's legislature ought to amend, repeal, or clarify outdated statutes—such as the OCCA for example. On the other hand, while many legal scholars argue stronger legislation is necessary to remediate certain high-interest lending,⁴¹⁷ this type of legislation alone is insufficient.

Between the FDCPA and various state laws regulating predatory lending practices, ineffective consumer protection laws are not the problem. The protections currently in place provide adequate protection—it is the enforcement of these protections that is lacking.⁴¹⁸ New legislation would not address the current limitations authorities face when attempting to eradicate fraudulent practices. Likewise, tribal nations, generally, are the most notorious predatory payday lenders. But, because they can assert a sovereign

416. Mary Spector, *Taming The Beast: Payday Loans, Regulatory Efforts, and Unintended Consequences*, 57 DEPAUL L. REV. 961, 996 (2008) (concluding that “[s]ustained enforcement by state and federal agencies is a critical element in effectively monitoring compliance” regarding high interest borrowing such as payday loans).

417. See, e.g., Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 Fed. Reg. 47864–01 (proposed July 22, 2016) (to be codified at 12 C.F.R. pt. 1041).

418. See Spector, *supra* note 416, at 995–96 (outlining proposed regulations aimed at “taming the beast” that is the payday lending industry, but conceding that “voluntary compliance by payday lenders could not be expected”).

immunity defense, effectually precluding legislation from remediating the evils at which it is directed, further lending regulations would prove ineffective.⁴¹⁹

As opposed to legislating new regulations, simply promulgating information to educate the public about current collection laws, such as the FDCPA, would prove cheaper and easier, while presumably achieving similar results.⁴²⁰ The public needs more education so people realize that defaulting on a private debt is not a criminal offense; people need to know that neither they nor their loved ones can be arrested or imprisoned for non-payment of these debts. This would strip collectors of their intimidating tactics on which they rely to perpetrate their fraudulent scheme. That is not to say that legitimate debtors should not be held responsible for valid contractual obligations, but government officials must find a more effective remedy to strike a balance between debtors' and creditors' rights to offset predatory collection attempts.

Finally, should all other solutions prove unsuccessful, one drastic option remains. Law enforcement could charge everyone involved in an illegal collection scheme under the Racketeer Influenced and Corrupt Organizations Act (RICO), which, ironically, Congress passed as part of the Organized Crime Control Act of 1970.⁴²¹ RICO confers upon

419. See Adam Mayle, *Usury On the Reservation: Regulation of Tribal-Affiliated Payday Lenders*, 31 REV. BANKING & FIN. L. 1053, 1058–72 (2012) (highlighting different states' and agencies attempts to regulate payday lending against tribal-affiliated payday lenders, and noting that “[t]his broad conception of tribal immunity has permitted tribal groups to pursue a wide range of commercial activities that are beyond effective regulation, including payday lending”).

420. Cf. Lisa Lake, *Stand up to Fake Debt Collectors*, FED. TRADE COMMISSION: CONSUMER INFO. (Apr. 10, 2015), <https://www.consumer.ftc.gov/blog/stand-fake-debt-collectors>.

421. See 18 U.S.C. § 1962 (2017) (“It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . .”); *Unencumbered Assets, Tr. v. J.P. Morgan Chase Bank (In re Nat’l Century Fin. Enters.)*, 617 F. Supp. 2d 700, 711 (S.D. Ohio 2009) (holding that “[w]hile it is true that ‘jurisdiction over

law enforcement the ability to criminally charge and prosecute *all* individuals involved in a particular criminal enterprise or racketeering conspiracy.⁴²² Albeit drastic, charging everyone from the lowest-level collectors to the ringleaders would send a loud and clear message to others employed in the industry that this behavior will not be tolerated.

Moreover, if low-level collectors realize their liberty is in jeopardy, it is unlikely that they would continue to protect their superiors, who reap enormous financial benefits, while collectors receive only modest wages.⁴²³ Collectors, on average, are not sufficiently well-compensated to justify taking the fall for their superiors. Therefore, if going after collection agency employees in supervisory roles continues to fall short of venerating consumer protection laws, utilizing RICO, presumably, would foster collectors proffering and becoming informants for law enforcement. Informants coming forward would allow law enforcement to work their way up chain to those orchestrating or facilitating unlawful acts.

From the shadows, Western New York's unregulated and uninhibited debt collection industry has terrorized Americans across the country. The anonymity now possible through modern technology has shrouded the lawless nature of collections and its pervasiveness in the WNY region. This, in turn, fostered the "Wild West" atmosphere observable today. Such unencumbered illegality presents a daunting

the individual officers of a corporation cannot be predicated merely upon jurisdiction over the corporation' . . . the mere fact that the actions connecting defendants to the state were undertaken in an official rather than personal capacity does not preclude the exercise of personal jurisdiction over those defendants."). This indicates that directors are subject to personal liability under RICO for the corporation's activities within a foreign state; the "corporate veil" provides no protection if a common conspiracy is established.

422. See 18 U.S.C. §§ 1961, 1962 (2017) (defining prohibited acts and available remedies).

423. See *supra* note 294 and accompanying text (providing that "Ciffa had a total income of \$1,284,951.04").

task for law enforcement to effectively reign in these ongoing, pervasive, and unlawful practices. Law enforcement has a duty to undertake this task, for illegal tactics have far-exceeded any bounds of reasonableness. While the first step is to bring these illegal practices out from the shadows, this alone is not enough. Taming WNY's debt collection industry will require the cooperation of law enforcement officials at every level—local, state, and federal. Working jointly fosters information sharing and allows each agency to utilize their own unique powers, expertise, and resources. The effectiveness of these solutions depends entirely on law enforcement's diligence and commitment to achieving results because, working alone, no agency can effectively tame New York's west.